No. 15005.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FLINTKOTE COMPANY, a corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, doing business as aabeta co.,

Appellees.

An Appeal From the District Court of the United States, for the Southern District of California, Central Division.

APPELLEES' BRIEF.

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Jurisdictional Statement.

Appellant's jurisdictional statement is correct except for its parenthetical allegation that appellees abandoned their claim for damages under the monopoly section of the Act (15 U. S. C. A. 2).

Statement of the Case.

Because appellees are unable to accede to either the accuracy or adequacy of the appellant's Statement of the Case, the following analysis of the pleadings and Statement of the Case are respectfully submitted:

The following references in appellee's Brief shall have the following meanings:

"aabeta co." shall refer to the fictitious name of appellees' business entity or jointly to both appellees;

"Lysfjord" shall refer to appellee Elmer Lysfjord;

"Waldron" shall refer to appellee Walter R. Waldron;

"Contractor Defendants" or "defendant contractors" shall refer to all other named co-conspirators;

"Association" shall refer to the defendant Acoustical Contractors Association of Southern California, Inc.

Individual contractor defendants may sometimes be referred to by an abbreviation, such as Reeder for L. D. Reeder Company; Coast for Coast Insulating Products Company; Krause for Gustave Krause; Howard for R. E. Howard. Individual officers and agents of Flintkote will in like manner be referred to as Harkins for Frank S. Harkins; Heller for Robert William Heller; Lewis for Sidney M. Lewis; McAdow for Harold H. McAdow; Ragland for Robert Eugene Ragland; and Thompson for E. F. Thompson.

The First Amended Complaint.

(Hereinafter referred to as the Complaint.)

Walter R. Waldron and Elmer Lysfjord, the appellees, operating under the style name of "aabeta co.," were engaged in the business of purchasing, selling, and installing acoustical tile in the Counties of Los Angeles and San Bernardino, and elsewhere in the State of California [R. 18-19]. The defendants were seven corporate competitors of plaintiffs, a trade association, the Flintkote Company, and eight individual defendants who were officers or managing agents of the competing corporate contractor defendants and the defendant association [R. 19-23].

Acoustical tile, as used in the Complaint, refers to a sound deadening material used on the walls and ceilings of public and private buildings which has been tested and has received a sound absorbing rating and approval by the Acoustical Materials Association (hereinafter referred to as A. M. A.) as having definite and ascertained sound

absorbing qualities [R. 23-24, 190-191]. During the period of time covered by this action and for many years prior thereto building specifications have required the use of acoustical tile carrying an A. M. A. approval or rating [R. 190-191, 193, 837]. During the same period of time all manufacturers of such tile sold their product directly to a limited number of acoustical tile contractors in the Los Angeles area, consisting solely of the contractor defendants herein [R. 1044; Exs. 12-13, App. Op. Br. p. 3], at identical and substantially lower prices than such tile could be obtained through middlemen jobbers or wholesalers [R. 270-273; Ex. 9]. Manufacturers do not place geographical limitations on their distributor outlets [R. 934; Ex. 11]. Substantially all A. M. A. approved tile sold and distributed for use in private and public buildings in the State of California is manufactured by a limited number of manufacturers in states other than the State of California and in the Territory of Hawaii. The defendant Flintkote manufactures such tile at Hilo, Territory of Hawaii, and sells and consigns it directly to the defendant contractors in the State of California as aforesaid [R. 24-26, 41-43, 1044, Ex. 9, App. Op. Br. p. 3].

Briefly stated, the Complaint charges the defendants with combining and conspiring among themselves and with others to restrain and monopolize the sale, purchase, installation, and distribution of competitive acoustical tile in the southern area of the State of California and elsewhere, and that in order to perpetuate this conspiracy and monopoly, the defendants, including the defendant Flintkote, conspired to, and in fact did, destroy appellees' acoustical tile contracting business by agreeing among themselves to deprive and by depriving appellees of their only available source of supply for the purpose and with the result of monopolizing all such sources of acoustical tile in the hands of the defendant contractors.

The Complaint charges that the purposes of the conspiracy were as follows:

(a) To maintain, adhere to, and perpetuate non-competitive prices, terms, and conditions of purchase of acoustical tile from manufacturers by defendant contractors and to protect and perpetuate an existing non-competitive price fixing and business allocation scheme and device existing among the defendant contractors in the general Los Angeles area of the State of California.

(b) To eliminate competition in the sale and installation of acoustical tile in public and private construction works in said area.

(c) To thus obtain high, non-competitive, and exorbitant prices for the sale and installation of acoustical tile in said area.

(d) To exclude all competition with the defendant contractors.

(e) To obtain a practical control and monopoly over the purchase, sale and installation of acoustical tile in said area;

(f) To deprive the public generally of the benefits of a competitive market in the expenditure of the public and private funds for schools, hospitals, offices, and other types of public and private construction in said area [R. 29-31].

The defendants are alleged to have done the following acts in furtherance of the conspiracy to restrain and to monopolize:

a. Conspired to restrain and monopolize interstate and foreign commerce in the sale and installation of acoustical tile in the Counties of Los Angeles and San Bernardino, California.

b. Agreed among themselves and with Flintkote to limit the sale of A. M. A. approved tile to the defendant contractors.

c. Allocated among the defendant contractors contracts for the installation of acoustical tile in schools, hospitals, and other public and private buildings pursuant to a collusive agreement among themselves whereby members of the defendant Association decided in advance of the filing of bids which member was to get a particular job and whereby all other members arbitrarily bid a higher figure to ensure this intended result.

d. By such means substantially increased the cost of public and private building projects for their own exclusive benefit and profit and to the detriment of the public generally.

e. Precluded any substantial competition in the sale and installation of acoustical tile in said area by knowingly monopolizing all available competitive sources of acoustical tile in defendant contractors.

f. The defendants (including Flintkote) agreed among themselves to destroy the plaintiffs' acoustical tile contracting business "for the sole purpose and with the sole intent of preventing plaintiffs from competing in the acoustical tile contracting business in the Counties of Los Angeles and San Bernardino, State of California, or in other areas in which the defendant acoustical tile contractors conducted such business for the purpose and with the result of thereby preserving the non-competitive price fixing and allocation scheme among the defendant contractors.

g. The defendants, and each of them, including the defendant Flintkote, agreed to terminate the supply of competitive acoustical tile products to plaintiffs pursuant to the conspiracy with Flintkote, and did in fact terminate plaintiffs' supply of competitive A. M. A. approved tile for the sole purpose and effect of preventing plaintiffs from competing with defendant contractors and to protect and perpetuate the existing monopoly in the sale and in-

stallation of acoustical tile theretofore existing among the members of the defendant association.

h. The defendant Flintkote entered into said conspiracy with the other defendants with full knowledge of and for the express purpose and effect of foreclosing plaintiffs' competition, and for no other reason [R. 31-35].

As a result of the foregoing conspiracy and monopoly appellees' acoustical tile business has been injured and substantially destroyed by reason of the fact that they have been deprived of an assured source of supply of competitive acoustical tile at competitive prices, and appellees are for this reason unable to bid competitively on any substantial contract, all of which has resulted in loss of actual and potential profits, in loss of good will between appellees and their established general contractor customers, in the loss occasioned by capital and business expenditures made in reliance upon a steady and continuing source of Flintkote acoustical tile and in other ways [R. 35-37].

Prior to the introduction of evidence at the trial the principal controverted issues were concisely defined in the opening statements of counsel and in appellant's Answer to the Complaint. Thus, appellant's counsel in his opening statement admitted that the general nature of the product and the number of people engaged in the industry were not in dispute [R. 183]; that the principal or only defense of FLINTKOTE was that in terminating appellees' source of supply of competitive acoustical tile it had acted independently and as a matter of sound business judgment [R. 185]; and *that Flintkote did not deny there were complaints made by other acoustical tile contractors that plaintiffs were competing with them on the same line of tile* [R. 185].

To justify this alleged "independent business judgment" Flintkote was reduced to the contention that plaintiffs were given only a limited right to sell and apply Flint-

kote tile in the Counties of San Bernardino and Riverside where the defendant contractors did not operate [R. 45-46, 184-185]. Under agreed instructions to the jury by the Court the jury by its verdict repudiated this contention and found for plaintiffs. With the foregoing in mind, the evidence adduced at the trial and the inferences properly to be drawn therefrom become particularly significant.

By agreement of counsel the Court, prior to the introduction of evidence, called the pertinent sections of the antitrust statutes to the jury's attention and carefully explained that the action was not based upon contract, but upon the antitrust laws of the United States [R. 185-187].

Again at the conclusion of the trial and after having previously instructed to the same effect, the Court expressly instructed the jury on the principal defense of appellant that:

> " 'The Flintkote Company can be liable for refusing to sell acoustical tile to plaintiffs only if such refusal to sell was in furtherance of and as a consequence of a knowing participation in an unlawful combination and conspiracy.'
>
> "In other words, we come back to the old principle that if the Flintkote Company was acting entirely on its own, without conspiracy with the other defendants, then there is no cause of action" [R. 1247].

By its verdict and under the instructions of the Court, the jury found that the defendant Flintkote eliminated the competition of plaintiffs "in furtherance of and as a consequence of a knowing participation in an unlawful combination and conspiracy."

At the end of the entire charge counsel for appellant signified their approval of the instructions as given with the single exception of their proposed Instruction 46A through 47F relating to the question of measurement of damages [R. 1224-1227, 1230-1231, 1259].

Evidence of the Conspiracy and Monopoly.

The seeds of the conspiracy and monopoly charged in the Complaint were sown in the basic distribution policy of the manufacturers and in the resultant monopoly of A. M. A. rated acoustical tile in the hands of the defendant contractor outlets constituting the membership of the defendant Association. During the period covered by the instant action and prior thereto all acoustical tile having an A. M. A. rating was manufactured by the following acoustical tile manufacturers, none of whom had their manufacturing facilities in the State of California, and who sold their tile directly in carload lots to the aforesaid defendant acoustical tile contractors on what is known as a "split distribution system" whereby two manufacturers used the same contractor as an outlet for its tile. Thus, the system worked as follows with the knowledge and approval of the manufacturers and the contractor defendants [R. 1086-1089, 1141-1142]:

Acoustical Tile Contractor	*Sources of Supply of A. M. A. Tile.*
R. E. Howard Company	U. S. Gypsum and Flintkote
Sound Control	National Gypsum and Flintkote
Coast Insulating Products Co.	Simpson Logging Company and Flintkote
R. W. Downer Co.	Armstrong Co. and Firtex
L. D. Reeder Co.	Armstrong Co.
Paul Denton Co.	Armstrong Co. and Flintkote
Acoustics, Inc.	Firtex-Flintkote
Harold E. Shugart Co.	Celotex

The only other line of A. M. A. tile which is sold in the area is manufactured by the Johns-Mansville Company who sell and install their own tile [R. 190-193, 780-781, 837, 841-847, 981, 1011, 1075-1082, 1088-1089, 1123].

The great bulk of acoustical tile installed in both public and private construction projects consists of 12″ x 12″ squares of ½″ thickness and 12″ x 12″ squares of ¾″ thickness. Of these two sizes the majority of installed tile is of the former size, both sizes being sold by manufacturers at identical prices [R. 272-273].

Aside from the uniform and parallel action of the manufacturers with respect to the price of tile [R. 272-273], it is clear from the record that most manufacturers acquiesced in the split distribution system by knowingly permitting its distributors to duplicate its product with that of an otherwise competing manufacturer.

Premised upon this monopolistic type of distribution system, the defendant contractors, commencing as early as 1950, took steps to eliminate competition among themselves in the sale and installation of acoustical tile in public and private buildings in the Southern California area [R. 302-307]. These defendants retained an estimator or accountant for the purpose of enforcing uniform methods of figuring bids among the defendant contractors, and to stabilize and enhance the price received by such contractors on acoustical tile installations [R. 307, 310, 1020-1028]. For purpose of enforcing this restraint of competition among acoustical tile contractors, it was agreed that the low bidder on each job would be disqualified in favor of the next lowest bidder. After a series of organized meetings among the contractor defendants [R. 1019-1028] their loose organization was incorporated into the defendant Association named in the Complaint in the year 1951. Both prior and subsequent to the incorporation of the latter defendant, the defendant contractors extended their price fixing activities to include arbitrary allocation of acoustical tile contracts among the

members of the Association [R. 309-310]. In the operation of this bid allocation scheme the contractor to whom a particular job had been allotted submitted his bid price in advance to all competing contractor defendants who in turn would enter a bid a certain percentage above that submitted by the contractor to whom the bid had previously been allotted. Thus, for example, the R. W. Downer Company upon receiving the proposed bid on a job which had been allotted to the R. E. Howard Company would take the Howard Company's figures and arbitrarily raise the Downer bid on the same job by 7½%. The other "competing contractors" would raise their bids above the Howard bid in the amount of other and different percentages [R. 310-335, 366-368, 493-524, 641-647, 672-673, 677, Exs. 18-29].

Appellees' Entrance Into the Acoustical Tile Contracting Field.

The appellees, Waldron and Lysfjord, were both experts in the acoustical tile contracting business. Appellant did not challenge this fact. Waldron had been associated with this business for approximately 20 years—Lysfjord for 12 years [R. 436-437, 661, 683, 694]. Their experience included the actual manual application of acoustical tile, the computing and submission of bids to general building contractors for acoustical tile installations, long years of experience in selling acoustical tile installations for two or more of the defendant contractors, the building of good will between appellees and their general contractor customers, and technical studies in sound control problems [R. 188-196, 208-209, 272-273, 335-336, 350-352, 402-403, 435-437, 442, 447-448, 641, 644-647, 659-660, 694, 706-707, 780, 826-827, 830]. In about June of 1951 their old friend in the acoustical tile field, Robert Rag-

land, became the Chief Promotional Man for Flintkote tile in this area [R. 779]. With a friend in court, so to speak, appellees immediately applied to Ragland for a line of Flintkote acoustical tile. Knowing the capabilities and experience of appellees and because Ragland felt they would enhance the sale of Flintkote tile, he desired them "on Flintkote's team" [R. 441-443, 826-827, 830, 834, 856-858]. Ragland accordingly, in about September of 1951, and after numerous discussions with appellees, arranged a meeting between himself, appellee Lysfjord, and his immediate superior at Flintkote, Mr. Baymiller [R. 443-445]. At this meeting Lysfjord reviewed appellees' experience in the acoustical tile field with Baymiller, including the fact that he had regularly been successful in obtaining contracts for the installation of large amounts of acoustical tile from many of the outstanding general contractors in the Los Angeles area. He named some of these contractors. Baymiller was impressed with appellees' ability and experience [R. 858-859, 943], and the meeting broke up with the assurance from Baymiller that a subsequent meeting would be called to further discuss the matter of appellees obtaining a regular supply of Flintkote tile [R. 445].

Approximately two weeks later a second meeting was arranged by Ragland and was attended by both of the appellees, by Ragland, Baymiller, and a Mr. Thompson, sales manager for all Flintkote building materials in the Southwestern area [R. 446]. At the prior meeting Baymiller had suggested that appellees bring to this meeting a portfolio of contracts to demonstrate to Thompson their ability to obtain business from general contractors in the Los Angeles area. This was done, and appellees again reviewed their experience and ability in the acoustical tile

contracting field in the Los Angeles area [R. 447-448]. At this meeting Thompson was also impressed by appellees and by the type and volume of acoustical tile contracts they had been accustomed to negotiate in the past [R. 858-859, 943, 1031]. Thompson at this meeting expressed his pleasure at this large volume of sales and inquired of appellees as to whether or not they felt they could continue selling these general contractors in the event Flintkote approved them as a dealer. Thompson also expressed his pleasure that appellees would handle only Flintkote tile [R. 847, 857-860, 866, 1031]. Thompson then expressed his own desire to have appellees "on Flintkote's team," Waldron warned Thompson that the established contractors in the field were not competing with each other for jobs, and would, therefore, object very strenuously to someone entering the field who would give them active competition [R. 979]. Thompson assured appellees they need have no fears on this score in the event Flintkote decided to give them its line of acoustical tile [R. 449-450]. At this meeting and probably at the prior meeting with Ragland and Baymiller appellees were asked if they would be willing to solicit business in San Bernardino County and Riverside County in addition to the Los Angeles area in the event they were given the Flintkote line [R. 449-450]. Thompson felt sure Flintkote would sell appellees tile if they would expend some effort in San Bernardino County in addition to the Los Angeles area, but that the final decision would lie with Mr. Harkins, the General Manager of Flintkote for the 11 Western states [R. 450-451].

In order to facilitate the final approval of appellees as Flintkote dealers they were asked to prepare a financial

statement and bring it to a meeting which would be arranged at the Flintkote offices [R. 450-451].

A few days later appellees were requested to come to the Flintkote offices for this final meeting and to bring their financial statement with them. When they arrived they were met by Ragland and Thompson, were congratulated, and were taken into Harkins' office [R. 451, *et seq.*]. After introductions Harkins congratulated appellees upon their becoming Flintkote acoustical tile contractors. Harkins was shown appellees' financial statement and *noted particularly* that portion of the statement wherein appellees projected their operations into the future [Ex. 44, p. 6]. (On the witness stand Harkins physically pointed out this portion of Exhibit 44 and stated he made particular note of it [R. 1073-1074]. Exhibit 44 indicated appellees' assets were approximately $50,000.00.)

On the cover of this financial statement there appeared the name of appellees' company "aabeta co." and in capital letters the address of appellees' place of business "Los Angeles" [R. 874-879]. That portion of Exhibit 44 to which Harkins paid particular attention [R. 1061] likewise listed the address of appellees' business as " Los Angeles" [Ex. 44]. At this meeting Harkins called appellees' attention to a large building project near Pomona and told them that Flintkote had sold a tremendous amount of roofing material to be installed on that job. He urged appellees to "sharpen their pencils" and go after the substantial amount of acoustical tile which was to be installed in the same job [R. 451-458, 921-922]. Pomona is, of course, in the Los Angeles trading area.

All of the foregoing occurred prior to the end of 1951 and immediately after the Harkins' meeting appellees resigned their assured and lucrative association with the defendant Downer. Lysfjord was requested by Downer to devote a part of his time for two or three weeks in order to process certain outstanding acoustical tile contracts which he had theretofore negotiated and turned over to Downer for installation. Downer at this time also tried to induce Lysfjord to remain with Downer by offering him a guaranteed minimum sales commission of $1500 per month [R. 662, 829, 830]. Appellees' testimony shows their sales for Downer involved sales in excess of one carload of tile per month. This was confirmed by Ragland and is otherwise not in dispute in the record.

The approval of Harkins and McAdow of Flintkote of appellees' Financial Statement [Ex. 44] would seem in itself sufficient to rebut appellant's unfounded innuendo relating to any reference to appellees' inability to compete through lack of financial backing as well as any contention that appellees were restricted to San Bernardino in their operations.

Activities of Appellees Upon Becoming Accredited Flintkote Dealers.

The record as a whole makes it abundantly clear that Flintkote's entire defense was based upon the fact that it acted independently in terminating appellees' only source of competitive acoustical tile for the sole alleged reason that appellees were doing business in the Los Angeles area contrary to an alleged understanding with Flintkote to restrict their operations to San Bernardino and Riverside Counties. Flintkote repeatedly stated through the mouths of their counsel and own witnesses that the only question involved was whether or not appellees were doing business in the Los Angeles area and that this alone was the reason for terminating appellees' source of supply [R.

992-993]. Yet, under questioning no witness for Flintkote was ever able to explain why if this was the reason Harkins, Thompson, Lewis, Baymiller, Heller, or Ragland did not utilize the simple expedient of asking appellees a simple question directed to this point until after all said individuals arranged for and attended numerous meetings with the contractor defendants at which appellees' competition with them was discussed.

The activities of appellees at this point further confirm the jury's verdict to the effect that the termination of appellees' source of supply of acoustical tile was solely the result of the conspiracy to drive appellees out of business, and that it was in no wise connected to the belated and obviously untenable excuse that this act was based upon a violation of Flintkote's agreement with appellees. Thus, commencing immediately after their meeting with Harkins of Flintkote, appellees commenced organizing their acoustical tile contracting business known as the "aabeta co." [R. 202]. On or about December 1, 1951, they obtained and occupied warehouse and office space situated on Atlantic Avenue in the City of Los Angeles [R. 203]. On December 15, the lease on this location was formally executed [Ex. 2, R. 204]. It was not until approximately thirty days after appellees had occupied the Los Angeles address that they entered into a lease for warehouse space in the San Bernardino area [Ex. 3, R. 205]. They likewise arranged for the printing of stationery and business cards for the aabeta co. [Ex. 4] which listed both the Los Angeles and San Bernardino addresses and telephone numbers of the aabeta co. [Ex. 4, R. 206]. The original sketch of this stationery was exhibited to Ragland who furnished the Flintkote emblem appearing on this stationery [Ex. 4, R. 459-460, 903-904]. Appellees also arranged for the publication of the fictitious business name of aabeta co., *first in Los Angeles* on January 11, 1952 [Ex. 5, R. 211], and *approximately a month later* in the County of San Bernardino [Ex. 6, R. 213].

Shortly after they became accredited Flintkote dealers-appellees actively solicited business from general contractors in the Los Angeles area [R. 216-217]. One of appellees' first jobs in the Los Angeles area was referred to them by Ragland of Flintkote. This job called for installation of acoustical tile in the offices of Owens Roofing Company in Los Angeles [R. 219]. Appellee Waldron estimated the Owens Roofing Company contract on aabeta co. stationery which listed the Los Angeles address and telephone number of aabeta co. [Ex. 4, R. 219-222].

Shortly after appellees had occupied their office and warehouse at Atlantic Avenue in the City of Los Angeles, Ragland, the acoustical tile promotion executive for Flintkote, came to their place of business there and advised appellees to place immediately an order for a carload of acoustical tile because of the fact that Flintkote's manufacturing facilities in the Territory of Hawaii were going to be closed for repairs [Ex. 46, R. 884-889]. Appellees placed this order on an ordinary order blank and gave it to Ragland at the appellees' Atlantic Avenue address in the City of Los Angeles [R. 223-224]. This original order was shipped from Hawaii on January 4, 1952 [Ex. 8]. McAdow, Flintkote's credit manager, examined Exhibit 44 very carefully at the time he accepted this original appellees' order, "he is a very cautious man in credit matters" [R. 1115-1116, 1120-1121]. Yet, both Harkins and the cautious McAdow premised their whole defense (as did appellant's counsel) upon the single fact that Flintkote had not authorized appellees to conduct their business in the Los Angeles area and knew nothing of their activities there. Their appeal to this Court is based upon the same proposition; *i. e.,* that there is no evidence to rebut this defense. The evidence is not in dispute that the Hilo plant did in fact close in accordance with Ragland's representations [Ex. 48, R. 894-898].

Flintkote's invoice for this original order of tile [Ex. 8] contained a delivery address in San Bernardino belonging to the California Decorating Company with which Waldron had an indirect association. This address was used because there was not sufficient room in appellees' Los Angeles warehouse to store a full carload of tile, and no facilities had been obtained at that time in San Bernardino [R. 222-228].

During the period between the Harkins' meeting in December, 1951, and February 19, 1952 (the date of termination), Ragland visited appellees at their Los Angeles office and warehouse approximately 24 times [R. 228]. During these visits he referred and called appellees' attention to other possible acoustical tile contracts in the Los Angeles area, including one at the Lido Hotel and cocktail lounge in Los Angeles [R. 229].

Flintkote during this same period also referred a request for bids for acoustical tile from the University of California which had been mailed directly to Flintkote [Ex. 9]. This request was mailed by Flintkote to the Los Angeles office of the aabeta co. [R. 230]. During Ragland's visits he also gave a list of all general contractors in the Los Angeles and San Bernardino areas to appellees for their general information. Ragland also checked certain names of general contractors in the San Bernardino area with whom he was personally acquainted [Ex. 10, R. 233-234] and with whom neither appellee had an acquaintance.

Appellees' activities in the acoustical tile contracting field became generally known to their competitors when they succeeded in obtaining a number of substantial contracts for the installation of acoustical tile in the Los Angeles area. At no time prior to the termination of their source of supply did appellees obtain or perform a contract other than in Los Angeles. The defendant Howard was vague as to how this knowledge came to him,

but stated it could have come from one of his salesmen or from one of the other acoustical tile contractors—possibly from the defendant Downer. In any event he called either Baymiller or Heller about appellees' competition [R. 1149-1150, 1153, 1155]. The defendant Krause, manager of the defendant Coast, stated that the matter came to his attention when appellees were successful in taking a contract away from Coast upon which the latter company had done considerable work and on which it had entered a bid [R. 1124]. The defendant Hoppe, owner of defendant Sound Control, learned of appellees' competition in much the same manner and discussed such competition with other defendant contractors [R. 1011]. Immediately upon losing this substantial contract to appellees, Krause called Mr. Sidney Lewis, assistant to Harkins at Flintkote [R. 1124]. Krause testified that he was naturally upset to find a new competitor in the market; that Lewis "became quite heated" and his conversation with Lewis "ended up by his telling me (Krause) to go to Hell. I will never forget that. I know that to be a fact" [R. 1125].

Krause called Lewis two or three times and insisted that Flintkote take immediate steps to stop appellees' competition [R. 1046-1048, 1050]. Hoppe of Sound Control made his objections to Flintkote concerning appellees' competition through Krause [R. 1050]. During the conversation with Lewis, Lewis told Krause that Flintkote had a right to open up or close down any distributor they wanted to [R. 1126]. In the same conversation Krause wanted an immediate meeting between Flintkote officials and the acoustical tile contractors [R. 1065, 1067, 1143]. Lewis told him Flintkote would not participate in such a meeting and Harkins affirmed this alleged stand by Lewis [R. 1064-1065, 1067, 1090-1091, 1099]. "There was a lot of commotion about it" [Appellees' competition, R. 1064]. Howard also called Flintkote about appellees'

competition [R. 1149-1150]. Flintkote's refusal to comply with Krause's request for a meeting is significant in view of the following facts:

Immediately after Krause made his demands known to Lewis the latter dispatched Baymiller and Heller (two Flintkote officials) to the offices of Coast where they met and discussed appellees' business activities with the defendants Krause and Newport [R. 949-951, 1125]. At this meeting Baymiller also "lost his temper in Mr. Newport's office and said that Flintkote had a right to their own business and they could handle it or see fit to give out any distributorship, franchises, or take any away they wanted. And Mr. Baymiller and Mr. Newport both parted feeling pretty hot" [R. 1128]. Also at this meeting there was no mention made or reference to appellees' business activity in any particular area. *There was only the general objection by Krause and Newport to appellees' operation in any area* [R. 1139]. Both Baymiller and Heller were incensed over the fact that an acoustical tile contractor should tell Flintkote how to run its business [R. 1141-1142]. Krause did not deny Lewis' testimony that he had told Lewis he wanted Flintkote to take immediate steps to stop appellees' operations and admitted he was very angry about appellees' competition with the other contractors in the area [R. 1143]. Shortly after the meeting between Newport, Krause, Baymiller and Heller, Ragland was told by Baymiller to pay another visit to placate the contractors [R. 952, 1144]. Krause testified that at this second meeting Ragland merely denied he was personally responsible for putting appellees in business and said that it was Harkins' decision that enabled appellees to obtain Flintkote tile [R. 1146]. At about the same time Baymiller, Heller, and Ragland were conferring with the competitors of appellees Harkins, the principal officer of Flintkote for the entire eleven western states, was also meeting and conversing with these same competitors. He

personally called the defendant Newport and asked him to lunch at the Brown Derby Cafe in Los Angeles to discuss appellees' competition [R. 1065-1066, 1091-1092]. Baymiller and Heller went immediately from the offices of Coast to the offices of the defendant Sound Control where they met not only the defendant Hoppe of Sound Control, but also found the defendant Howard of the defendant Howard Company waiting for them [R. 951]. It is also significant that Krause of Coast knew all about this latter meeting and continued to "needle" Flintkote about appellees' competition [R. 1130]. Howard had previously called Flintkote on the phone to complain of appellees' competition [R. 270, 1149-1150].

Hoppe was obviously expecting the call, as was Howard. Hoppe admits that he talked to other contractors regarding appellees' operations, and that they were not happy about it—they "never welcome" new competition [R. 1010-1011, 1017-1018]. Howard refused to say whether he had been asked to be at Sound Control's offices [R. 1151].

Howard testified that when he talked to Baymiller and Heller at Sound Control's offices, Baymiller did not commit himself as to whether plaintiffs should or should not be in San Bernardino or whether Flintkote would or would not restrict them there or what Flintkote would do [R. 1157-1158]. It was obviously apparent to the jury from the foregoing and other facts that at this point Flintkote was faced with the dilemma of acting legally and independently as it had done when they appointed appellees as Flintkote dealers, or agreeing with appellees' competitors to put appellees out of business in order to preserve the non-competitive situation then existing in the industry. The untenable and improbable nature of appellant's position is further illustrated by a comparison of the statements of its witnesses with what was actually done. After Lewis (the second in command at Flintkote) is alleged to

have emphatically informed Krause that Flintkote had the right to sell acoustical tile to appellees, and after allegedly refusing to attend a meeting of the acoustical tile contractors he nevertheless immediately substituted for such meeting a series of meetings between appellees' competitors and various officials of Flintkote for the same purpose and with the same effect and which conclusively negate any "independent business motives" of Flintkote. Thus, while Lewis would not permit Krause, Baymiller, Howard, Hoppe, and other competing contractors to call a formal meeting of protest, Lewis sent Baymiller and Heller to discuss appellees' competition with the same individuals. Baymiller sent Ragland to cover the same ground which he and Heller had previously covered [R. 990], and at the same time Mr. Harkins met and obviously connived with Newport regarding the same subject matter. Baymiller on the witness stand could state no reason why Ragland should again meet and confer with defendants Hoppe, Howard, Newport and Krause concerning appellees' competition in the market place [R. 992].

In the light of the foregoing the following facts are also significant as a complete repudiation of appellant Flintkote's limited defense, and their obvious attempt to belatedly obscure their illegal conspiratorial acts aimed directly at appellees [R. 993-994].

Harkins, after personally conferring with appellees' competitors and after ordering all of the top ranking officers and agents of Flintkote to repeatedly confer with such competitors, still felt it necessary—for a reason never explained to the jury—to have the acoustical tile promotion man of Flintkote, Ragland, make an additional investigation of appellees and submit a written "report," as to "whether or not appellees were doing business in the Los Angeles area" [R. 922-928, 932-933]. It is noteworthy, however, that this report consists largely of

items having nothing to do with the only question in Harkins' mind [Ex. I, R. 903-904, 906]. Under cross-examination none of the defense witnesses, including Ragland, Baymiller, Thompson, Heller, Lewis, and Harkins (all Flintkote officials), could offer any explanation to the jury why these extraneous and admittedly irrelevant matters were contained in the report [R. 1103-1105]. The uniform reply of these Flintkote witnesses on this point was to the effect that these extraneous items had nothing to do with Flintkote's purported interest in appellees' operation [R. 907, 925-928, 932-933, 944]. Here again, the testimony of the same witnesses is in conflict. Ragland admitted that Harkins asked for the information contained in his report [R. 907-908, 922-927] and admitted further that other than his instructions he saw no other purpose for the extraneous items being in his report. Therefore, the only possible conclusion the jury could draw from the testimony on this defense exhibit was that after appellant had agreed with appellees' competitors to eliminate appellees' competition, Flintkote deliberately set about to manufacture some legal justification for its then contemplated act of complying with its conspiratorial agreement.

In connection with the above Exhibit I and Flintkote's limited defense generally, it is interesting to note the contradictions in Ragland's testimony in his deposition taken prior to trial and his testimony during the trial with respect to this report. In his deposition he denied, contrary to the evidence, that until a few days prior to February 15, 1952 (the date of his report), that he had any idea of the fact that appellees were operating in the Los Angeles area, and that in order to find appellees' Los Angeles address he was compelled to go around "knocking on doors" [R. 908].

After receiving Ragland's report and after all of the meetings with appellees' competitors—and it is to be

noted that in none of them did the contractor defendants state or admit that Flintkote took the position they now rely upon—even then Harkins is stated to have felt it necessary to call in the "privy counsel" of Flintkote officers (Lewis, Thompson, Baymiller, and Ragland) for the alleged purpose of further discussing appellees' position and the action to be taken by Flintkote with respect to the demands of appellees' competitors [R. 1070]. In appraising appellant's defense the jury must have considered the fact that even yet Flintkote had not contacted appellees in any way to find the answer to the single question which appellant says was involved; *i. e.,* whether appellees were doing business in Los Angeles [R. 960-961]. The result of this "privy counsel" meeting was that Harkins—and again without consulting appellees—delegated *three* of the top Flintkote officials to perform the simple task of notifying appellees that Flintkote would no longer supply them with its line of acoustical tile [R. 235-239, 240-241, 249-250, 933]. There can be no doubt that this termination was an unconditional refusal to sell and final in all respects [R. 1071-1072, 1096-1097]. The pertinent facts with respect to this termination meeting are, of course, somewhat in conflict—even as they relate to the testimony of appellant's own witnesses on direct and cross-examination.

Nevertheless, the following facts are clear: (1) appellees were shocked at being notified their source of supply had been shut off [R. 954]; (2) this was obviously their first intimation of the disaster; and (3) the manner of termination as well as all of the acts of defendants leading up to the event are most inconsistent with the simple "business motive" upon which the defense hangs.

It is, of course, clear under the law that appellees were under no obligation to introduce evidence showing consideration flowing to Flintkote in payment of a knowing and illegal participation in the conspiracy to destroy ap-

pellees' acoustical tile contracting business. In spite of this legal principle, however, there was evidence from which the jury could have found—had it been necessary —such a consideration. This evidence is as follows and is relevant to show not only a consideration, but is indeed strong evidence to repudiate Flintkote's limited defense in the action. At the very time Flintkote was negotiating with appellees for the purpose of giving them the Flintkote line of acoustical tile, they admittedly had one outlet, namely, the defendant Sound Control, who was unsatisfactory in that it was using Flintkote tile only as a supplement to its regular competing line of acoustical tile manufactured and supplied to it by the National Gypsum Company [Ex. J, R. 1007-1009, 1014, 1078]. Contrary to appellant's statement (page 3 of their Opening Brief) to the effect that Sound Control was supplanted in June of 1952 by the defendant Acoustics, Inc. as Flintkote's third dealer in the Los Angeles area, this substitution was actually made at or about the very time Flintkote was terminating the supply of tile to the appellees [R. 1016, 1044*].

Here again the fact that Acoustics, Inc. (a relative inexperienced newcomer in the acoustical tile contracting business [R. 838-839, 851] and a member of the defendant Association) was chosen in preference to a reinstatement of appellees who were experienced and who handled only Flintkote tile is again evidence of the conspiracy to monopolize all approved tile within the membership of the Association and to maintain the status quo of the preexisting monopoly in that respect. Finally, Exhibit J shows beyond doubt that commencing as soon as possible after Flintkote had agreed to and did accede to appellees' competitors' demands to eliminate appellees' competition,

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*Appellant's Ex. J shows that Acoustics in the year 1952 purchased $63,640.94 worth of Flinkote tile while Sound Control purchased only $3,590.72.

the three other Flintkote dealers increased substantially their purchases of Flintkote tile [R. 1043-1044, 1075-1076].

When it is considered that there is a lapse of from two or three months to as much as eight or ten months between the acceptance of an acoustical tile bid and the actual purchase and installation of the tile [R. 1082], these figures are especially illuminating and point to the fact that the increased purchases reflected in the exhibit commencing with the year 1952 and 1953 would justify the inference that such increases were the result of an agreement by appellees' competitors to purchase more Flintkote tile as compared to their purchases of competing tile in consideration of Flintkote's agreement to eliminate appellees' competition with members of the Association.

Therefore, to mention only a few of the evidentiary highlights showing Flintkote's knowledge of and participation in the conspiracy we find:

(1) Their admitted knowledge of the non-competitive nature of the industry as it existed in the Los Angeles area [R. 1086-1089];

(2) The objections of appellees' competitors to any new competition in the area, including specifically that of appellees;

(3) The pertinent and admitted conniving as evidenced by the repeated and numerous conferences between Flintkote and appellees' competitors for the obvious purpose of finding ways and means and excuses to destroy appellees' competition;

(4) The concoction by Flintkote of a wholly unnecessary and irrelevant written report in a futile attempt to obscure their knowing cooperation in the destruction of appellees' acoustical tile business, their admitted destruction of same;

(5) The contradiction between the testimony of appellees and the defense witnesses;

(6) The complete lack of any attempt by the defendants during the course of the trial and through the large number of contracting defendants called by Flintkote who were directly involved to inquire into or make any attempt to rebut or discredit the testimony of appellees and exhibits with regard to the bid allocation and price fixing scheme established against the contractor defendants, and finally, the undeniable fact that it was only after (a) appellant had investigated and approved appellees as Flintkote contractors and (b) thereafter at the behest of appellees' competitors, Flintkote admittedly destroyed appellees' acoustical tile business by taking away its sole supply of tile and almost immediately giving it to Acoustics, Inc., a relatively inexperienced competitor of appellees and a member of defendant Association.

Evidence on Damages.

In view of the admitted and *established act* of Flintkote in terminating appellees' only source of supply of competitive tile, the fact of damage cannot be disputed. The record further shows without serious dispute: (1) That appellees spent substantial sums of money and extensive effort in obtaining business facilities and in organizing and otherwise establishing their branch operations in San Bernardino [Exs. 38-39, R. 216-217]; (2) That each of the appellees as experienced salesmen had negotiated contracts for execution by the Downer Company which amounted to approximately one carload of tile per month [Exs. 38-39, R. 668, 681], since each appellee's monthly sales commission with Downer amounted to in excess of $1200 a month which in turn amounted to 10% of the gross installed price of acoustical tile in the area. As appellant has pointed out an additional 10% on said sales (constituting Downer's net profit) would have come

to appellees in the operation of their own business. (3) That under the established and undisputed pricing formula in effect in the acoustical tile contracting business the net profit on each carload of tile to appellees would have been approximately $5400 [Exs. 38-39]. Neither of these facts were disputed in the record and indeed appellant deliberately avoided reference to such facts in examining any of the contractor defendants or their representatives which Flintkote called as their own witnesses during the course of the trial. (4) There is no dispute whatever that appellees after the tortious act of appellant herein were compelled to pay 17% more for the non-competitive acoustical tile they were able to purchase than they would have paid for approved competitive acoustical tile in the absence of such tortious acts. (5) That after appellant had terminated appellees' source of supply of competitive approved acoustical tile on or about February 19, 1952, appellees were unable to bid for acoustical tile jobs of any consequence because of their lack of an assured source of supply of A. M. A. approved tile to perform such jobs [R. 270-276], and that (6) The record shows without dispute that the measure of appellees' damage resulting from appellant's tortious acts culminating in the termination of their only available source of competitive tile is as follows: *a.* Loss of out of pocket money as a result of not being able to continue their San Bernardino operation $1920. [Exs. 38-39.] This item is not disputed. *b.* Out of pocket money resulting from the necessity of appellees having to pay from 17% to 20% more for non-competitive and unapproved tile in uncertain quantities from lumber yards in the amount of $12,758.57 over a three-year period. [Exs. 38-39.] There is some conflict of opinion evidence on the exactness of this figure. *c.* Loss of profits occasioned by appellees' inability to compete because of their inability to obtain an assured source of supply of accredited tile projected through the first full year of operation in the amount of $43,200 based upon

the sale of only one carload of tile per month by *both appellees*. The record is clear and without dispute that each appellee had been accustomed to selling approximately this amount of tile per month. *d*. Loss of profits in the amount of $64,800 projected through the second year of operation based upon the expert testimony of appellees and upon their undisputed testimony regarding their past accustomed sales experience with Downer and their ability to continue such sales volume. *e*. Loss of profits in the sum of $86,400 for the third year of operation based upon the same evidence and contemplating the normal (undisputed) anticipated growth. Again, neither the experience or past performance of appellees nor their opinion as to anticipated growth of their own venture was seriously disputed or attacked during the course of trial.

Summary of Appellant's Contentions and Argument in Reply to Appellant's Specification of Error.

Point 1 of appellant's specification of alleged error challenges or deals with the sufficiency of the evidence to sustain the jury's verdict and charges error in the Court's refusal to set aside the jury's verdict. Appellees contend the evidence was sufficient to require the submission of the case to the jury and was sufficient to support the jury's verdict in favor of appellees. Points 2, 3, and 4 of appellant's specification of alleged error charge error in the admission of evidence in the form of documents showing price fixing and job allocation among the contractor defendants, in the admission of certain testimony by appellees as to declarations of Ragland relating to conversations between Flintkote officials and the defendants Krause, Howard, and Newport concerning and objecting to the competition of appellees with the contractor defendants in the Los Angeles area. Appellees contend that there was no error committed in connection with the admission of this evidence; that in any event any alleged

error now urged was waived and was not prejudicial to appellant; that this Court must limit its review of such alleged error in the admission of evidence to the limited scope of appellant's final motion to strike at the conclusion of all of the evidence. Points 5 through 10 of appellant's specification of alleged error charged error in the Court's instructions to the jury, and in the Court's failure to give other instructions. Appellees contend that the instructions as actually given by the Court were approved as given and no objections were in fact made by appellant at the time the instructions were given, with the single exception of appellant's request that the Court instruct the jury in accordance with its proposed Instructions 46A through 46F which said instructions involved a contrary and conflicting theory of law, which appellees submit was erroneous and contrary to the evidence in the case, and that the instructions as given by the trial court were proper and legally correct. In point 11 appellant charges alleged error in the trial court's refusal to grant its motion for a new trial upon the ground that the verdict was against the weight of the evidence. It is appellees' contention that the Court's ruling in this respect was correct, and that under the facts and evidence of this case, the trial court's decision is not reviewable here. Points Nos. 12 and 13 charged alleged error in the instructions with respect to the period of time in which damages could be measured. Appellees contend that the jury was correctly instructed on this point, and that appellant's proposed instruction 46A through 46F was contrary to the law and the evidence. Point 14 of appellant's specification of alleged error challenges the reasonableness of the attorney's fees fixed by the Court in the sum of $25,000. Appellees contend that the amount of attorney's fees so awarded was reasonable, and that appellant in its brief to this Court and in its objections to the attorney's fees in the Court below has admitted substantially the reasonableness of such fee. Point 15 of appellant's speci-

fication of alleged error challenges the trial court's disposition of the $20,000 paid to appellees by appellant's co-conspirators in consideration of a covenant not to sue. Appellees contend that the decision of the trial court providing for the deduction of this sum from the judgment of $150,000 was correct.

For convenience of argument and in what we believe to be the interest of orderly presentation, this brief will treat the various points sought to be raised herein by appellant in the following order: Point 1 pertaining to the sufficiency of the evidence to sustain the jury's verdict and the Court's ruling on appellant's motions mentioned therein will be treated in section I of this brief. Points 2, 3, and 4 relating to the admission of evidence will be treated in section II of this brief. Points 5 through 10 charging alleged error for the Court's failure to adequately give certain instructions proposed by appellant at the commencement of the trial, but to which no objection was raised at the time the Court instructed the jury, will be discussed in Section III of this brief. Point 11 relating to the Court's refusal to grant appellant's motion for a new trial, etc. on the grounds that the verdict was not supported by legally sufficient evidence, and that the verdict was against the weight of the evidence will be discussed under Section IV of this brief. That portion of appellant's Point 11 relating to the alleged excessiveness of the damages will be treated in Section V of this brief in connection with the general argument pertaining to damages as will Points 12 and 13 relating to the instructions of the Court with respect to the measurement of damages. Point 14 of appellant's specification of alleged error relating to the reasonableness or unreasonableness of the attorney's fees fixed by the Court will be discussed in Section VI of this brief. Point 15 relating to the trial court's disposition of the $20,000 paid to appellees in consideration of the covenant not to sue will be discussed in Section VII of this brief.

ARGUMENT.

I.

The Evidence Was Adequate to Sustain the Finding of the Jury That Flintkote Knowingly Participated in an Unlawful Conspiracy. The Trial Court Properly Denied Appellant's Motion to Set Aside the Verdict. (Error No. 1, App. Br. pp. 11, 46.)

Preliminarily the Court's attention is directed to the fact that appellant's argument is dependent upon the following untenable propositions:

1. A request that this Court reweigh and reevaluate isolated portions of the entire evidence to the exclusion of all other evidence before the jury.

2. A complete avoidance of the instructions of the Court and the finding of the jury as applied to that part of the overall conspiracy causing appellees' damage, namely, Flintkote's agreement with appellees' competitors to destroy their business; and

3. A patent attempt to divert this Court's attention from the knowledge of Flintkote of the inevitable effect and unlawful character of Flintkote's act of destruction pursuant to its agreement with appellees' competitors (App. Br. pp. 46-60).

Concisely stated, the question now before this Court is whether there was any evidence in the record supporting the jury's conclusion that Flintkote knowingly agreed with appellees' competitors to destroy or restrain appellees' ability to compete in the industry for the stated purpose of aiding the contractors' monopoly. We believe there is no doubt that there was such evidence in the record. We believe the evidence is sufficient to support a conclusion by the jury that Flintkote in fact had to have knowledge not only of the immediate phase of the conspiracy causing appellees' damage, but of the entire conspiracy and monopoly existing in the industry as a whole.

In the latter connection it would seem clear that the jury need only have found that Flintkote knowingly participated with appellees' competitors for the illegal purpose and effect of destroying or restraining appellees' competition—a conspiracy and restraint which is a *per se* violation of the Sherman Act.

Appellant admits in its brief that there was evidence tending to show a conspiracy among the acoustical contractors to fix prices and allocate jobs (App. Br. p. 47). It must also admit there was evidence showing a monopoly of all accredited and competitive acoustical tile in the hands of said contractors, that there was a total lack of price competition among manufacturers of such acoustical tile, that other types of competition among acoustical tile manufacturers was likewise restrained or eliminated through the so-called "split selling" policies of the manufacturers whereby a single defendant contractor constituted the sole outlet for two otherwise competing lines of acoustical tile, and that the inevitable result and the admitted purpose of terminating appellees' only available source of supply was, in addition to the destruction of appellees' competition, to perpetuate and preserve this non-competitive picture in the industry [R. 190-193, 780-781, 837, 841-847, 981, 1011, 1075-1082, 1086-1089, 1123, 1125-1126, 1128, 1130, 1139, 1141-1143]. Appellant also does not deny the expert and qualified character of appellees and their approval of appellees as an acoustical tile outlet for its product [R. 450-451, 858, 859, 943, 1031, 1062; Ex. 44].

Flintkote does not and cannot deny that its officials held *numerous* meetings with appellees' competitors for the sole purpose of discussing their complaint about appellees entering the acoustical tile business [R. 1143-1146, 1149-1151, 1157-1158]. The record shows likewise without dispute that after agreeing with its co-defendants to eliminate appellees' competition, an unsatisfactory co-

defendant contractor was replaced by another and inexperienced co-defendant contractor as an outlet for Flintkote tile [R. 838-839].

Appellant's own exhibit shows without dispute that after Flintkote agreed to and did in fact destroy appellees' competition, its sales of acoustical tile to Flintkote's co-conspirators increased immeasurably [Ex. J]. There can be no doubt from the record that the evidence including all of the circumstances thoroughly discredited the sole defense of Flintkote that they acted independently in terminating appellees' source of supply and for the sole reason that appellees were alleged to have been violating their agreement with Flintkote to the effect that they would not do business in the Los Angeles area where Flintkote's co-conspirator contractors operated [R. 202-206, 459-460, 651-652, 903, 904, 1162-1164, 1176, 1186; Exs. 2, 3, 4, 5, 6, 44]. Flintkote officials obviously intended and knew from the start that appellees' principal business operations were in fact to be in the Los Angeles area [R. 228-229, 1061, 1115-1116, 1120-1121; Exs. 4 and 44].

The record is utterly devoid of any evidence whatsoever even remotely indicating a *sound business motive* on the part of Flintkote for terminating appellees' source of supply of tile unless in fact it consists of a promise from appellees' competitors to increase their own purchases of such tile at the expense of "competing lines" of tile which they likewise handled [Ex. J]. Such a business motive obviously would avail Flintkote nothing as a defense here.

The foregoing are merely examples of the circumstantial and other evidence in the record which as a whole must, in the minds of the jury, have thoroughly discredited Flintkote's untenable defense.

In its brief appellant admits that there is sufficient evidence in the record "to support a conclusion that Flintkote

cut off the plaintiffs as a result of the activities of Flintkote contractors in complaining to Flintkote" (Br. p. 48). Appellant likewise admits in its brief (Br. p. 52) that the meeting between Flintkote and appellees' competitors admitted to by Ragland was relevant as "one circumstance which in combination with others might show that Flintkote * * * conspired with the contractors." According to appellant's own testimony it would seem equally clear that the repeated meeting reflected therein between all of the top ranking Flintkote officials and appellees' competitors, for the purposes hereinabove stated would, of course, be even more relevant to such a showing of conspiracy. The evidence stands uncontroverted that the sole and only purpose of these latter admitted meetings was to discuss appellees' competitors' demands that Flintkote agree to destroy appellees' ability to compete. Flintkote's entire argument here as well as in other portions of its brief amounts to nothing more than a reiteration of its argument to the jury which was repudiated by the jury's verdict. The general theories of law enunciated in the cases cited in appellant's brief (pp. 47-50) may be admitted for purposes of argument herein. The simple answer is that all of the principles enunciated there find substantial support in the evidence. Flintkote's factual argument in this section of its brief (pp. 46-60) patently ignores the essential knowledge and inevitable effect of its conspiratorial act in agreeing with appellees' competitors to put appellees out of business. Other parts of their argument with respect to the admissibility of Ragland's admissions pertaining to other meetings between Flintkote and certain of appellees' competitors will be treated hereinafter under a separate heading.

The law on the subject is clear:

> "It was not incumbent on the government to prove that each defendant participated in that conspiracy

in all of its ramifications, for, in order that one be found guilty as a conspirator, it need only be shown that, with knowledge of the existence of the conspiracy, he knowingly performed an act designed to promote or aid in the attainment of the object of that known conspiracy. *Craig v. U. S.,* 9 Cir., 81 F. 2d 816, 822, certiorari dismissed 298 U. S. 637, 56 S. Ct. 670, 80 L. Ed. 1371, certiorari denied 298 U. S. 690, 56 S. Ct. 959, 80 L. Ed. 1408; *Johnson v. U. S.,* 9 Cir., 62 F. 2d 32, 34-35; *Marcante v. U. S.,* 10 Cir., 49 F. 2d 156, 157."

United States v. National City Lines, 186 F. 2d 562; cert. den. 71 S. Ct. 735; 341 U. S. 916.

"The criterion to be employed in determining whether concerted action is such as to come within condemnation of Sherman Anti-trust Act is the effect which the action has upon fair competition, and, if concerted action destroys competition, it is unlawful. Sherman Anti-Trust Act, § 1, 15 U. S. C. A."

United States v. Socony-Vacuum Oil Co., 105 F. 2d 809.

"A conviction resting solely upon circumstantial evidence is not an innovation. It is, we think, well established that the proof and evidence in an anti-trust conspiracy case is, in most cases, circumstantial. Proof of a formal agreement is unnecessary, and were the law otherwise such conspiracies would flourish; profit, rather than punishment, would be the reward. See *American Tobacco Co. v. U. S.,* 6 Cir., 147 F. 2d 93, affirmed 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575. As stated in *Interstate Circuit, Inc. v. United States,* 306 U. S. 208, 221, 59 S. Ct. 467, 472, 83 L. Ed. 610, 'As is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of

> direct testimony that the distributors entered into any agreement with each other * * *. In order to establish agreement it is compelled to rely on the inferences drawn from the course of conduct of the alleged conspirators."
>
> *C-O-Two Fire Equipment Co. v. United States,* 197 F. 2d 489 (C. C. A. 9th).

In a recent criminal case decided by this Court the same contentions were made as here, namely, that there was insufficient evidence to support the conviction of a union representative who did not compete with the plumbing contractors defendants to fix prices and eliminate competition. There a plumbing contractor in Nevada had obtained a particular plumbing contract for the now defunct Las Vegas race track. Two of the competing contractors attempted to retrieve this contract for members of the conspiracy, by utilizing the services of a union representative named Alsup. This Court found no difficulty in connecting Alsup to the plumbing contractor conspiracy. In its opinion this Court stated:

> "In Sylvester's presence they asked Alsup to protect them. Alsup readily furnished plumbers to Sylvester on another project for the Atomic Energy Commission at the same time he refused to furnish plumbers to work at the race track. The jury could rightfully infer, and so did that, Alsup's actions were in favor of the pleas of the plumbing contractors that they be protected."
>
> *Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F. 2d 732.

It would seem difficult to distinguish the position of Alsup in this case from that of Flintkote even under the latter's own position on this appeal, since there, as here, Alsup controlled the sole means of eliminating Sylvester's competition by depriving Sylvester of the means of com-

peting; namely, necessary union labor. Here Flintkote was prevailed upon pursuant to admitted pleas from appellants co-conspirators to withdraw appellees' sole source of supply of material which alone could prevent appellees' competition with the co-conspirator acoustical tile contractors in the area.

One Joining Subsequent to Original Conspiracy Is Liable for Preceding Acts of Co-conspirators.

A co-conspirator who knowingly joins, aids, or abets a pre-existing conspiracy becomes liable for the acts and liabilities of his co-conspirators done or made prior to his entrance into the conspiracy. This has been the uniform rule in the Ninth Circuit and elsewhere. Thus, in *Roberts v. United States,* 248 Fed. 873 (C. C. A. 9th), cert. den. 247 U. S. 55, it was held that the statements of the original conspirators could be received against a co-conspirator who joined in the common purpose after the declarations were made. The common purpose here was admittedly to put appellees out of business and thus maintain the monopoly of their competitors. In that case the defendant was indicted for entering into a conspiracy, to extort money from an alleged violator of the White Slave Act by impersonating an officer of the United States. The Court stated (p. 80):

> "We do not find that the admission of evidence relating to matters that occurred prior to Roberts' connection with the case was in any way prejudicial to the defendant Roberts. This evidence was purely introductory, and was only significant in the light of the testimony relating to the proceedings in which the defendant Roberts afterwards participated. *Besides, the evidence was admissible under the familiar rule that, where a person enters into a conspiracy after its formation, the acts and declarations of the other conspirators before he entered are admissible against him.*"

That the rule has always been thus is shown by the case of *Lincoln v. Clafin, 7* Wall. 132, involving a conspiracy to defraud where the Court stated (p. 138):

> "* * * but the Court held that it was sufficient to show that he subsequently, with knowledge of the fraud, became a party to it; that subsequent participation in the fraud and its fruits was as effective to charge him, as preconcert and combination for its execution. In thus holding we perceive no error * * *. If, knowing the fraud contrived, he aided in its execution, and shared its proceeds, he was chargeable with all of its consequences, and could be treated and pursued as an original party. Every act of each in furtherance of the common design was in contemplation of law the act of both. * * *"

It is settled beyond controversy that an agreement in order to be a violation of the act need not be expressed, but may be and usually is "implied from a course of dealing or other circumstances." (*United States v. Schrader's Son, Inc.*, 252 U. S. 85, 89.)

In the instant case the basic question so far as Flintkote is concerned is the purpose of Flintkote in terminating appellees' only source of supply of acoustical tile. Therefore, the validity or invalidity of such a defense itself must be decided upon the basis of the inferences drawn by the jury from all of the circumstances surrounding the act of termination. These circumstances must, of necessity, include the persuasion exerted upon Flintkote by the other co-conspirators, who were competitors of appellees, and who are shown to have lodged their objections to appellees entering the business of acoustical tile contracting work to the appellant, Flintkote. These objecting co-conspirators sought to prevail upon Flintkote to perform the act of terminating appellees' source of supply for a purpose. The sole purpose has been shown in the evi-

dence and found by the jury under explicit instructions to be the elimination of appellees' competition and the effect of this competition upon a fixed, non-competitive scheme of price fixing and bid allocation among the co-conspirators participating therein. Likewise, there can be little doubt from the evidence that Flintkote had to know the monopolistic position of its co-conspirators with respect to their control of available sources of A. M. A. approved competitive acoustical tile. There is other evidence pertaining to this basic purpose and effect. This evidence stems from the prolonged negotiations between Flintkote and the appellees which lead up to appellees being given the Flintkote line of acoustical tile. The fact that such pressure had been brought to bear was admitted at the final conference between appellees and the Flintkote officials at which appellees were notified that Flintkote would *no longer sell them acoustical tile* [R. 1096-1097]. Appellant through its own witnesses affirmatively introduced evidence of numerous meetings between Flintkote officials and appellees' competitors for the sole purpose of discussing these competitors desire to have Flintkote aid them in destroying appellees competition.

Behind this backdrop of evidence the real purpose and intent has been shown by the activities of the co-conspirators by way of price fixing and bid allocation among themselves on a non-competitive, fraudulent basis. The inference is inescapable from this latter evidence that any outside competitor would disrupt this carefully laid and effective non-competitive plan. From all of the evidence the inference to be drawn was, as charged in the complaint, that the sole reason for Flintkote's act of terminating appellees' source of supply was the protection of the existing monopolistic situation among the acoustical tile contractors named as co-conspirators herein, and was the result of an agreement (coerced or otherwise) between

Flintkote and said co-conspirators to eliminate appellees' competition in the industry.

It is so well established as to hardly need citations that participation in a conspiracy may be proved by circumstantial evidence. The mere commission of an overt act has been held to be sufficient to submit to the jury the question of whether the defendant was a party to the unlawful design, providing the overt act was of a type which had for its purpose or necessary effect the assisting in the accomplishment of the illegal design and purpose.

Likewise, participation in a conspiracy at its inception and knowledge of specific details of the conspiracy have never been held to be essential in order to hold a conspirator joining the conspiracy subsequent to its formation. The cases go so far as to hold that the late joining conspirator need not have known or have met his fellow co-conspirators. He need only knowingly participate in, aid or abet a single, illegal aspect of the overall general purpose and design of the conspiracy. In the instant case the inevitable effect of Flintkote's act in terminating appellees' source of supply was to eliminate their competition with the co-conspirators named herein. The illegality of this act, if performed as a result of an agreement or understanding with one or more of said co-conspirators, would be clear. The circumstantial and direct evidence mentioned hereinabove, it is submitted, is sufficient to justify the jury's verdict without more.

Regarding the fact that knowledge of specific details is not essential to make one joining the conspiracy late liable, see *Cal-Cutt v. Gerig,* 171 Fed. 220, involving a suit to recover damages on the ground that the defendants had entered into an illegal conspiracy to force plaintiff's minstrel show out of town by using threats and violence. There the Circuit Court of Appeals held that:

> "All those who participated in the unlawful violence inflicted upon the plaintiff are equally liable

as co-conspirators, regardless of whether they were original parties thereto or not."

Cal-Cutt v. Gerig, 171 Fed. 220.

Knowing participation in the form of an affirmative act in furtherance of any illegal aspect of the conspiracy is sufficient to hold a co-conspirator. (*United States v. Spadafara,* 181 F. 2d 955 (cert. den. 71 S. Ct. 233.) In a Ninth Circuit Court of Appeals decision, *Nye & Nissen v. United States,* 168 F. 2d 846, affirmed 69 Sup. Ct. 766, the above doctrine was followed, and the Ninth Circuit Court of Appeals further held that once the existence of a conspiracy is established, *only slight evidence* may be sufficient to connect an individual with the conspiracy, citing *Meyers v. United States,* 94 F. 2d 433, and *Phelps v. United States,* 160 F. 2d 858.

See also, *Alaska Steamship Co. v. International Longshoremen's Association,* 236 Fed. 964; *Fowler v. United States,* 273 Fed. 15 (C. C. A. 9th).

In the instant case we think it clear that the jury could have found that Flintkote was promised and received consideration for its conspiratorial acts in furtherance of the conspiracy in the form of added purchases of tile by its co-conspirators to compensate for Flintkote's loss of sales to appellees. However, benefit or detriment to a co-conspirator is not essential. In *Patterson v. United States,* 222 Fed. 599, 620, the Court stated:

> "We have seen that conspiracies in restraint of trade in commerce are not confined to conspiracies by competitors, or on behalf of a competitor against a competitor. It is not even necessary that the execution of the conspiracy be of any benefit to the conspirators. *It is sufficient that it will restrain interstate trade or commerce of the person conspired against."* (Emphasis added.)

The above principle was aptly described in the case of *Cape Code Food Products v. Nat'l Cranberry Ass'n* (D. C. Mass., 1954), 119 Fed. Supp. 900-910, wherein a banker was convicted of assisting certain cranberry merchants and processers in eliminating a competitor's competition. To the same effect see *Darnell v. Markwood,* 220 F. 2d 374.

In conformity with the above principles the cases are numerous which hold that knowing participation in an illegal object of the conspiracy by an individual co-conspirator is sufficient to hold him liable as a co-conspirator. See for example *Marino v. United States* (C. A. A. 9th), 91 F. 2d 691, 699, where the Court stated:

> "The court also instructed the jury that if appellant Gullo 'gave the use of his premises for the landing or the storage of the alcohol, he assisted in the enterprise,' and that it seemed to the court that it would not be a violent inference to infer that appellant Gullo had knowledge of the conspiracy. We believe the inference is correct. It is highly improbable that Gullo could permit such use of his premises, without knowing that the men who stored the alcohol had agreed to defraud the United States. Of course the court instructed the jury that his comment on the evidence was 'in no sense controlling upon' the jury.
>
> "A very similar instruction was given regarding defendant Spooner. We likewise believe it to be correct. Finally, each of the appellants contends that there is no substantial evidence to support the verdicts. We have set forth the portion which, if believed, is pertinent. Each contends that there is no proof of knowledge.
>
> "The evidence related shows that appellant Spooner assisted in the actual unloading of the alcohol. Under

the circumstances, it was a proper inference to infer that Spooner knew that there was an agreement to smuggle the alcohol into this country and thus defraud the United States.

"With respect to appellant Machado, the proof showed that he helped unload the alcohol and stored it on his property. Under the circumstances, knowledge on his part could be properly inferred.

"The jury could have properly inferred that appellant Marino was a principal conspirator by agreeing to the use of the boat for which he received freight tribute.

"As to Gullo, the evidence is meager, though we believe sufficient. It is true that: 'The failure of a person to prevent the carrying out of a conspiracy, even though he has the power so to do, will not make him guilty of the offense without further proof that he has in some affirmative way consented to be a party thereto.' *Weniger v. United States* (C. C. A. 9), 47 F. (2d) 692, 693. But here, Gullo permitted his premises to be used for storage and the recanning of alcohol. Such permission aided the purpose of the conspiracy, and as we have said, the jury could properly infer knowledge.

"We find no error affecting the substantial rights of appellants.

"Affirmed."

One knowingly taking part in carrying conspiracy into effect is a party thereto, though he joined at a later stage or took minor part or may not have known all conspirators.

Mendelson v. United States, 60 F. 2d 532.

The law requires no more than affirmative action on the part of a conspirator to carry an illegal purpose into effect to hold him as such.

Marino v. United States, supra;

United States v. Empire Hat and Coat Mfg. Co., 47 F. 2d 395;

Curley v. United States, 160 F. 2d 229.

"It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. * * * It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators.' *Interstate Circuit v. United States,* 306 U. S. 208, 225, 227, 59 S. Ct. 467, 474, 83 L. Ed. 610."

Goldman Theatres v. Loew's, et al., 150 F. 2d 738.

See also to the same effect:

Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d 721;

American Tobacco Co. v. United States, 328 U. S. 781;

Rocona v. Guy F. Atkinson Co., 173 F. 2d 661 (C. C. A. 9th).

Compulsion or Coercion of Co-conspirator Upon Flintkote Is No Defense to Flintkote's Illegal Act in Terminating Appellees' Source of Supply.

In *United States v. Paramount Pictures, et al.,* 66 Fed. Supp. 323, 352, the minor distributor defendants (including Universal and Columbia) sought special consideration on the ground that they had been compelled by the large exhibitor defendants in that case to accede to

the condemned plan of distribution. In answer to that contention the Court stated:

> "The defendants argue that these privileges granted to the circuits flow from their negotiations with the individual theatre-owners rather than from a standard policy of discrimination deliberately pursued by them. This is perhaps true, but the result is the same whether the bargaining power of the large exhibitors forces upon the distributors a discriminatory policy, or whether the latter voluntarily carry such a policy into effect. Acquiescence in an unreasonable restraint, violates the Sherman Act."

The Supreme Court in the same case expressly stated with regard to this contention of the minor defendants:

> "There is some suggestion on this as well as on other phases of the case that large exhibitors with whom defendants dealt fathered the illegal practices and forced them onto the defendants. But as the District Court observed, that circumstance if true does not help the defendants. For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one."
>
> *United States v. Paramount Pictures,* 334 U. S. 131, 161, 68 S. Ct. 915, 931.

The conclusive answer here, of course, is that the jury found as a fact that Flintkote did knowingly aid, abet, and join a conspiracy to prevent appellees from competing with Flintkote's co-conspirators in the sale and installation of acoustical tile.

II.

There Was No Error Committed by the Trial Court in the Admission of Evidence. The Alleged Errors Urged Here Were Waived by Appellant and Were Not Prejudicial. (Specification of Error Nos. 2, 3, 4.)

Under this portion of its brief commencing at page 61 appellant first contends that prejudicial error was committed in connection with the admission of evidence relating to the price fixing and bid allocation scheme practiced by its co-conspirators. Appellant objected to the admission of this testimony on the ground that Flintkote had not been connected with the conspiracy. The Court admitted this evidence subject to a motion to strike in the event appellees failed to connect Flintkote to the conspiracy [R. 293]. At the end of the appellees' case Flintkote moved to strike the same testimony on the same ground, namely, that there was no evidence in the record connecting Flintkote to an illegal conspiracy [R. 714]. This motion was made simultaneously and in connection with Flintkote's motion to dismiss or in the alternative for a directed verdict [R. 714]. Both motions were overruled by the trial court and Flintkote thereafter proceeded to introduce defense evidence.

At the close of all of the evidence appellant renewed its motion for a directed verdict as well as its motion to strike certain parts of the evidence. This latter motion to strike, however, was limited solely to the testimony of Lysfjord with respect to Ragland's admissions. The testimony sought to be stricken occurs along with other matters on pages 474 to 480 of the record [R. 1214-1215].

The general principles of law applicable here are as follows:

First, Rule 43, Rules of Civil Procedure, 28 U. S. C. A. 728, *et seq.,* provides that the rules of evidence are to be

construed in favor of the reception of evidence in accordance with the most convenient method prescribed in any of the statutes, rules, or principles applying to the admissibility of evidence. Similarly, where the judgment is for a plaintiff and the whole evidence, with all inferences the jury could have drawn from it, was insufficient to support a verdict for defendants, the judgment should not be reversed although there may have been errors in ruling on the evidence or in charges given or rejected.

Rule 61, Federal Rules of Civil Procedure, relating to harmless error provides:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The granting or denying of appellant's motions at the end of the plaintiff's case in the Court below was discretionary with the trial judge and the Court's discretion should be regulated not merely by an alleged lack of evidence at that time, but by the probabilities of whether such evidence will arise before the whole evidence is in at the end of the case. (*Bates v. Miller* (1943), 133 F. 2d 645; cert. den. 63 S. Ct. 1446.) It is the accepted and better practice to defer such rulings until the close of the case.

Guess v. Baltimore & O. R. Co., 191 F. 2d 967;

Wright v. Paramount, etc., 97 Fed. Supp. 833.

It is equally clear that having proceeded with its defense evidence after its motion to strike and to dismiss were overruled at the end of plaintiff's case, Flintkote waived such motions except insofar as the subject matter of the same were covered or referred to in its motion to strike and for a directed verdict at the end of all of the evidence. Flintkote's motion at this latter stage of the proceedings is as follows [R. 1214-1215]:

> "Mr. Black: At this time, if the Court please, we wish to renew our motion for a directed verdict in favor of the defendant * * * on the ground there is no evidence to connect the defendant to a knowing participation in a conspiracy that is competent.
>
> "And in that connection, we renew our motion to strike the testimony of the plaintiff Lysfjord as to Mr. Ragland's alleged admissions contained in pages 381 and 387 of the transcript."

Appellee Waldron's testimony regarding these same admissions of Ragland were not covered by appellant's motion to strike. Waldron's testimony appears at pages 261, 262, 263, 269, and 270 of the Record. Nor did said motion cover the numerous documents [Exs. 18-37] relating to price fixing and bid allocation among Flintkote's co-conspirators or the identifying and explanatory oral testimony of the appellees regarding this evidence. Each of appellant's own witnesses were examined on the latter matters as will be shown hereinafter. Appellant's objection to the admission of evidence must, by this Court, be limited, therefore, to the evidence sought to have been stricken by its motion made at the conclusion of the case, namely, to the fragmentary bit of appellee Lysfjord's testimony at pages 474 to 480 of the printed record. Likewise, the question of whether or not appellant was prejudiced must be decided at this point in the light of all

of the evidence in the record, and the trial court's ruling thereon would not seem to be reviewable by this Court in the absence of a clear showing of an abuse of discretion *to the prejudice of appellant.* Since the motion to set aside the judgment here was based upon the weight of the evidence and alleged errors in the admission of evidence (which in any event were not prejudicial and which were waived) there would seem to be no basis for this Court's disturbing the judgment below.

A. The Evidence Regarding: (1) Bid Allocation and Price Fixing Among the Contractor Defendants, and (2) Ragland's Admission of the Overt Acts of Krause, Newport, and Howard Was Admissible.

In the case of *International Indemnity Co. v. Lehman,* 28 F. 2d 1 (cert. den. 49 S. Ct. 83), the Court held:

> "The rule we deduce from these cases is that an admission of one conspirator, if made during the life of the conspiracy, is admissible against a joint conspirator, when it relevantly relates to and is 'in furtherance of the conspiracy.' Construing the expression 'in furtherance of the conspiracy' reference is not to the *admission* as such, but rather to the act concerning which the admission is made; that is to say, *if the act or declaration, concerning which the admission or declaration is made, be in furtherance of the conspiracy, then it may be said that the admission is in furtherance of the conspiracy.*" (Italics supplied.)

See also *Vitagraph, Inc. v. Perelman,* 95 F. 2d 142 (C. C. A. 2, 1936), involving a Sherman Act suit.

In *Pan-American Petroleum Co. v. United States,* 9 F. 2d 161 (C. C. A. 9, 1926), affirmed 273 U. S. 456, the Court expressly recognized that an agent may bind the

corporation by his admissions and declarations although they relate to past events and transactions. In so holding the Court stated (p. 169) that:

> "There can be no question but that the declarations of an officer or agent of a corporation, even though they consist of a narrative of past facts, may, under appropriate circumstances, be admitted in evidence against the corporation, nor does the admissibility of such declarations necessarily depend upon the length of time that has elapsed between the occurrences and the declarations, 10 R. C. L. 978."

In the case of *Clune v. United States,* 159 U. S. 590, the Court expressly recognized that it was familiar law that where a case rests partially or even wholly upon circumstantial evidence, much discretion is left to the trial court, and its ruling will be sustained, if the testimony which is admitted tends even remotely to establish the ultimate fact. Here one ultimate fact was Flintkote's purpose.

In *Reeder v. United States,* 262 Fed. 36, and in the cases cited therein for the proposition, the Court stated with respect to evidence similar to that objected to here, that:

> "An examination of this record discloses that all of this testimony had relation to the common purposes of violating the statute * * * and that these organizations were working with defendants in carrying out the intents and purposes of the alleged conspiracy. The act of such organizations in furtherance of the common purpose is evidence against all co-conspirators; and this is so though the conspirator committing the act was not a defendant in the case being tried. *Clune v. United States,* 159 U. S. 590, *Eisenhower v. United States,* 256 F. 842."

Finally, in the case of *Delaney v. United States,* 263 U. S. 856 (per Mr. Justice McKenna), the Supreme Court stated:

> "The only exception, however, was to the testimony given by one of the conspirators of what another one of the conspirators (the latter being dead) had told him during the progress of the conspiracy. We think the testimony was competent and within the ruling of the cases (citing cases). And it has been said that the extent to which evidence of that kind is admissible is much in the discretion of the trial judge. * * * We do not think the discretion was abused in this case."

We submit that the evidence clearly shows that Ragland and other Flintkote officials were in fact unnamed co-conspirators in the case—the defendants, Krause, Newport, and Howard were named conspirators.

Even where evidence of a crime, other than that with which defendant is charged, tends to throw light on a particular fact or to explain conduct, the trial court has a discretion as to admitting that evidence, which a reviewing Court will not ordinarily interfere with. (*United States v. Sebo,* 101 F. 2d 889.)

In a conspiracy case wide latitude is allowed in presenting evidence, and it is within the discretion of the trial court to admit evidence which even remotely tends to establish or explain the conspiracy charged.

Phelps v. United States, 8 Cir., 160 F. 2d 858;

Egan v. United States, 8 Cir., 137 F. 2d 369 (cert. den. 320 U. S. 788, 64 S. Ct. 195, 88 L. Ed. 474).

In *Vilson v. United States,* 61 F. 2d 901—a Ninth Circuit opinion—this Court held that:

> "The common object of the associated persons forms a part of the *res gestae* and evidence was admissible even though conspiracy was not charged * * * all of which was for the jury's consideration in determining the guilt or innocence * * * as an aider or abetter. He was guilty as a principal."

Again, in *Flanagan v. Provident Life & Accident Ins. Co.,* 22 F. 2d 136, the Circuit Court there observed:

> "There can be no well defined rule as to what is properly admissible as a part of the *res gestae* in all cases, and in passing on the question in each individual case the trial judge is acting in the exercise of his discretion, and in the absence of an abuse of that discretion there is no error." (Citing cases.)

On this appeal it is obvious that appellant cites no facts which could be construed so as to show an abuse of discretion. Appellant's sole argument in this respect is premised upon idle surmise on what "might" have influenced the jury. It need only be pointed out that appellant's own affirmative evidence standing alone "might" have been the deciding factor in the mind of the jury.

The Second Circuit in *Eagle Lion Film v. Loew's, Inc.,* 219 F. 2d 196, held that:

> "* * * under the Federal Rules of Civil Procedure, the relevance of evidence is nowhere keyed to the particular persons before the court. And so far as some detailed items of proof may depend upon a preliminary showing of conspiracy, the fact that co-conspirators have not been named as parties does not at all prevent or aid the showing of their complicity."

A case particularly in point is *Lee v. Mitcham,* 98 F. 2d 298, holding that

> "Evidence of Edmonston's intention was pertinent to the issue—indeed it was the issue,—and the court was compelled to receive any competent evidence which would prove what that intention was."

Also, Flintkote's intention was the crux of the only defense offered and appellant recognized the competency of the evidence which they say here should have been stricken by the trial court (App. Br. p. 52).

For the scope of admissibility of evidence pertaining to motive, intent, and purpose, see the following cases.

American Tobacco Co., et al. v. United States, 147 F. 2d 93 (affirmed 328 U. S. 781, 66 S. Ct. 1125);

Standard Accident Ins. Co. v. Heatfield (C. C. A. 9th), 141 F. 2d 648;

National Labor Relations Board v. Pacific Greyhound Lines (C. C. A. 9th), 91 F. 2d 458;

Mayola v. United States, 71 F. 2d 65 (C. C. A. 9th);

Compare:

Craig, et al. v. United States, 81 F. 2d 816 (C. C. A. 9th), cert. den. 56 S. Ct. 670;

Standard Oil Co. v. United States, 221 U. S. 1, 75-76.

In *Gordon v. United States,* 164 F. 2d 855; cert. den. 68 S. Ct. 741, 330 U. S. 862, the Court held:

> "Much of the testimony objected to was so closely a part of the history of the conspiracy and of the substantive act as to be part of an interwoven chain of relevant circumstances. It lay within the dis-

cretion of the trial court as to whether it should be admitted, and this discretion was not abused. *United States v. Sebo,* 7 Cir., 101 F. 2d 889. The fact that some of the testimony indicated the complicity of the accused in other crimes did not make it inadmissible, since it tended to throw light upon facts and conduct in issue. *Means v. United States,* 62 App. D. C. 118, 65 F. 2d 206."

Finally this Court's attention is directed to Appendix A, consisting of a certified copy of the record in *Socony-Vacuum Oil Co. v. United States, supra.*

The relevancy of Ragland's admissions seems sufficiently clear as to make extended argument unnecessary here. They were admissions of the first overt acts of the conspiracy which ultimately resulted in the destruction of appellees' business—overt acts of named co-conspirator defendants which were obviously in furtherance of the conspiracy. Even appellant admits their relevancy (App. Br. p. 52). Contrary to appellant's statement there, Ragland's admissions pertaining to the objections of appellees' competitors and these competitors expressed desire at that time to have Flintkote aid them in terminating appellees' business were relevant as bearing directly upon not only the intent and purposes of the conspiracy, but they likewise were pertinent as indicating (in the light of other evidence) Flintkote's purpose in participating in that part of the conspiracy directly resulting in appellees' damage.

The same thing is true of the evidence pertaining to the price fixing and bid allocation scheme of the contractor defendants. Appellant at the close of all of the evidence apparently conceded the relevancy of this latter

evidence since it failed to cover such evidence in its motion to strike. Furthermore, appellant's attempt to pass Ragland off as a minor employee of Flintkote should avail them nothing in the face of the record in this case. Ragland was admittedly the chief promotional tile man for the Flintkote Company in this area. He was directly in charge of promotion and sales. We think furthermore the record shows clearly that Ragland was one of the principal actors with respect to Flintkote's participation in the conspiracy. From the time of the initial objections of appellees' competitors to and including the actual termination of appellees' supply of acoustical tile, he was clearly shown to be an agent of Flintkote as well as an unnamed co-conspirator along with Harkins, Lewis, Thompson, Baymiller, and Heller of the Flintkote Co. We believe all of this evidence was admissible under the law as evidence of the conspiracy, the purpose and intent of the conspiracy, the knowledge and purposes of Flintkote regarding the immediate object of the conspiracy aimed directly at the destruction of appellees' business, and that such evidence was obviously a part of the *res gestae* as being explanatory of the conspiracy and its purposes.

All of the above evidence, together with direct evidence produced by appellant regarding the numerous meetings betweens its officials and appellees' competitors and Flintkote's admitted knowledge of the monopoly of all accredited acoustical tile in the hands of the defendant contractors [R. 1086-1089] was likewise pertinent to show the extent of Flintkote's knowledge and participation as an aider and abetter of that part of the overall conspiracy relating to the price fixing and bid allocation activities of the defendant contractors.

B. The Alleged Errors Urged by Appellant (Nos. 2, 3, and 4) Were Not Prejudicial and Were in Fact Waived by Appellant During the Course of the Trial.

The early Supreme Court case of *Hansen v. Boyd,* 161 U. S. 397, 16 S. Ct. 571, stated:

> "The sixth assignment relates to the overruling of a motion, made at the close of the evidence for plaintiffs, that the court instruct a verdict for the defendant; and assignments 7 to 15, inclusive, attack portions of the charge to the jury. As to the alleged error in refusing to instruct a verdict at the close of the evidence for plaintiffs, it is sufficient to say that it has been repeatedly held by this court that when, after such a motion, the defendant introduces testimony, as was done in the case at bar, an exception to the action of the court in refusing to direct a verdict is waived. *Runkle v. Burnham,* 153 U. S. 216, 14 S. Ct. 837."

This Circuit in *Boulter v. Commercial Standard Ins. Co.,* 175 F. 2d 763 (rehearing den. Aug. 17, 1949), stated:

> "It urges that when the appellants rested, after concluding their testimony in the court below, they had not made a *prima facie* case, and that the court should have sustained the appellee's motion to dismiss, made at that stage of the proceedings. We deem it unnecessary to discuss this question since the appellee proceeded to introduce the evidence upon which the appellants now rely, and thereby wavied any error that may have been made in the court's ruling. *Moore v. Tremelling,* 9 Cir., 100 F. 2d 39, 43; *Bates v. Miller,* 2 Cir., 133 F. 2d 645."

In *Novick v. Gouldsberry,* 173 F. 2d 496 (C. C. A. 9, 1949) this Court stated in connection with a case arising under an Alaska statute:

> "This section accords with what was the federal rule generally, prior to the adoption of Rule 50, Federal Rules of Civil Procedure. And this Court has held that if such motion is made by a defendant and is overruled, it is waived by the subsequent introduction of evidence by him. *Fulkerson v. Chisna Mining & Imp. Co.,* 9th Cir., 1903, 122 Fed. 782, 784; *Walton v. Wild Goose Mining & Trading Co.,* 9th Cir., 1903, 123 Fed. 209, 214; *Northwestern Steamship Co. v. Griggs,* 9th Cir., 1906, 146 Fed. 472; and see, *Hansen v. Boyd,* 1896, 161 U. S. 397, 16 S. Ct. 571, 40 L. Ed. 746; *Union Pacific Ry. Co. v. Daniels,* 1894, 152 U. S. 684, 14 S. Ct. 756, 38 L. Ed. 597; *Runkle v. Burnham,* 1894, 153 U. S. 216, 222, 14 S. Ct. 837, 38 L. Ed. 694."

> "* * * Nor is it now important to determine whether there was evidence sufficient to charge these defendants when they moved to dismiss at the close of plaintiff's case, for the case now should be determined upon a survey of the whole evidence, which, as Wigmore says, 'naturally renders any prior error immaterial.' 9 Wigmore on Evidence, 3d Ed., 1940, §2496, citing cases; *Columbia & P. S. R. Co. v. Hawthorne,* 144 U. S. 202, 12 S. Ct. 591, 36 L. Ed. 405; *Brown v. Carver,* 2d Cir., 45 F. 2d 673."

Bates v. Miller, 133 F. 2d 645 (2d Cir., 1943, cert. den., 63 S. Ct. 1446).

To the same effect see:

Boston Ins. Co. v. Fisher, at al., 185 F. 2d 977 (8th Cir., 1950; rehearing den. Jan. 25, 1952);

Home Ins. Co. of New York v. Dahila (1954), 212 F. 2d 731;

Auto Transport v. Potter, 197 F. 2d 907;

Meier & Pohlmann Furniture Co. v. Troeger (1952), 195 F. 2d 193;

Capital Transport Co. v. Compton (1951), 187 F. 2d 844.

The waiver by appellant of its original objections to evidence and its original motion to strike the same at the end of plaintiffs' case is based upon the same principle as the foregoing cases respecting motions to dismiss or similar motions. Objection to competency of evidence is lost if the objecting party himself offers testimony on the same subject matter as evidence. Under these circumstances it cannot be said that any alleged error concerning the original evidence is prejudicial.

In *United States v. Gruber,* 123 F. 2d 307 (C. C. A. 2d) the court held:

> "Particular objection is made to the cross-examination by the government of some of the appellant's character witnesses. One of them, Charles S. Colden, the County Judge of Queens County, New York, testified that Gruber had an excellent reputation for truth and veracity. Judge Colden had given answers which indicated that he had in a general way followed the work of the appellant while a Deputy Assistant Attorney General of the State. He was, however, asked on cross-examination whether Paul McCauley, an Assistant Attorney General of the State, had reported to the Chief of the Securities Division that he had information that Gruber had received a bribe as a Deputy Assistant Attorney General. While Colden denied that he had heard the rumor, there would, under some circumstances, be prejudice in suggesting reports of the commission of crimes not within the scope of the indictment. But, whether or not the question was permissible, it cannot be regarded as damaging,

in view of the fact that Gruber took the stand himself and was examined fully about the alleged bribery and explained that the charge against him was withdrawn by a litigant who had made the complaint and that the matter was closed to the satisfaction of the Attorney General of the State. Objections are made to similar questions to the character witnesses Pette, Fitzgerald and Brunner, who answered that they had not heard of the report that the appellant had been charged with receiving a bribe. There is no claim that the government's counsel did not ask the questions in good faith and the error, if any, was cured by appellant's own testimony."

In *Trouser Corporation of America v. Goodman & Theise, Inc.,* 153 F. 2d 284 (C. C. A., 3d), the Court held:

"But we think the defendant waived this objection. In cross-examination of the plaintiff's witness A. A. Fogley, the defendant asked for the statement made by Housley to the witness. When Housley was called by defendant he was asked in direct examination if he had made the statement attributed to him. Objection to competency is lost if the objecting party himself offers the same testimony as evidence.[6]"

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[6]Jones Commentaries on Evidence, 2d Ed., 4994, §2524, Waiver of Objections:

"Where the objection is not to the form or nature of the particular evidence, but to the substance or subject matter, the objecting party may also waive objection by himself introducing evidence of the facts objected to, or by suffering the particular subject to be opened up without objection."

The numerous state cases and less frequent federal decisions cited in support of the rule do not express it with the same succinctness as the commentators have. Whether par-

ticular circumstances fit the rule or its exception is often difficult to determine from the record. In the instant case, not only was Housley asked whether he had made the statement to the admission of which the same counsel had previously objected, but Fogley was also questioned concerning the statement Housley had made. That fact, we feel, is of sufficient weight to bring the Housley statement in on the ground of waiver of objection by use of subsequent evidence of the same nature.

This Court in *Franklin v. United States* (1912), 193 Fed. 334, ruled that where the trial court permitted handwriting testimony (subsequently admissible in Pennsylvania) over objection, the conduct of the objectors with respect to the same type of evidence cured the defect of admission.

In *Bevard v. Bevard,* 103 Fed. Supp. 533, the Court stated:

> "The defendant, Mrs. Grace Bevard, was called as a witness for the plaintiff. Mrs. Bevard, who is now eighty-six years of age, testified that she was not generally familiar with the administration of the Katherine Bevard estate, but that her husband had told her that the estate had been settled. The latter testimony was unquestionably objectionable as hearsay, but such objection was cured when the same fact was subsequently brought out by the plaintiff's own cross-examination of Mr. Shoemaker."[2]

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[2]*United States v. Gruber,* 2d Cir., 123 F. 2d 307; *Trouser Corporation of America v. Goodman & Theise, Inc.,* 153 F. 2d 284 (C. C. A. 3).

To the same effect see:

National Distilleries Corp. v. Comphanhia, etc., 107 Fed. Supp. 69.

Compare *Anglo California National Bank v. Lazard,* 106 F. 2d 693 (C. C. A. 9), holding that objections to the competency of evidence received on condition of other proof are waived unless later renewed by a motion to strike.

Preliminarily, it would seem to be clear that in the absence of the testimony and evidence sought to be stricken

by any or all of appellant's motions the remainder of the evidence justifies the verdict of the jury to the effect that appellant conspired with competitors of appellees to eliminate appellees' competition in the industry. Indeed the evidence coming from the mouths of appellant's own officials and contractor witnesses pertaining to Flintkote's knowledge of the contractor defendants' monopoly of all approved acoustical tile and the numerous meetings between Flintkote officials and appellees' competitors would seem to be sufficient under the law to compel an affirmance of the jury verdict and judgment.

The only evidence sought to be stricken by appellant's final motion to strike [R. 1214-1215] is the testimony of appellee Lysfjord relating to a conversation with Ragland in which Ragland stated that Krause had called at the offices of Flintkote to object to appellees' competition; that Howard had similarly objected either by telephone or by personal call, and that Newport of the defendant Coast Company had objected either in person or by phone [R. 474-480]. It has hereinbefore been shown that appellee Waldron gave the same testimony of Ragland's admissions which was not covered by appellant's motion to strike. It is likewise clear that appellant's own witnesses described in detail *numerous* similar meetings and contacts between Flintkote officials and appellees' competitors for the purpose of discussing the demands of appellees competitors that Flintkote aid them in terminating appellees' competition. These numerous meetings and their surrounding circumstances which were testified to affirmatively by appellant's own witnesses were much more decisive of the issue than were the so-called Ragland admissions [R. 1012, 1018-1029, 1046-1050, 1065-1068, 1090-1093, 1100]. As we have stated, there is no difference in either the purpose, objects, or the subject matter of these numerous meetings testified to by Flintkote witnesses from the subject matter of the so-called Ragland admissions. The only conceivable distinc-

tion or conflict could in no wise have had any significance to the jury nor have effected any prejudice to appellant. The difference would seem to consist solely of the fact that the meetings and conversations were held at the places of business of the objecting contractors and at the Brown Derby Restaurant rather than at the offices of the Flintkote Company. The record likewise shows that at the outset of the case the chief counsel for appellant, in his partial opening statement to the jury, admitted the very substance of the so-called Ragland admissions. He there told the jury that Flintkote would not dispute the fact that it had received objections to appellees' business activities from appellees' competitors [R. 184-185].

Similarly, with respect to the evidence relating to price fixing and bid allocation among the defendant contractors (to which appellant's final motion to strike made no reference) each of the witnesses called on behalf of Flintkote was interrogated on direct examination concerning their price fixing and bid allocation activities. As an example only, see Record 1012, 1018-1029, 1065-1068. Similar interrogation along the same line was used in connection with the other contractor defendants called by Flintkote and with most, if not all, of the Flintkote officials called by appellant.

The record will show that the testimony of appellant's own witnesses regarding their conversations and meetings with Flintkote officials concerning appellees' competition, when compared to the evidence of the admissions of Ragland to appellees, were by far stronger and more convincing proof of conspiracy purpose and intent [R. 949-951, 990, 1010-1011, 1017, 1018, 1046-1048, 1050, 1064-1065, 1067, 1090-1091, 1099, 1124-1125, 1126, 1128, 1141-1144]. Therefore, it is submitted that there could have been no prejudice to appellant under the law as enunciated in the foregoing cases from any such evidence.

III.

There Is No Merit to Appellant's Assignment of Error Relating to the Giving or Failure to Give Instructions to the Jury. (a) The Appellant (With a Single Exception) Did Not Object to the Instructions as Given by the Court and in Fact Approved the Court's Charge. Appellant, Therefore, Is Precluded From Urging Error on Appeal. (b) The Court's Instructions as Given Were Adequate and Legally Correct. (Points 5-10.)

It is axiomatic under the Federal Rules of Civil Procedure, the local rules of the District Court of Southern California, Central Division, and under the adjudicated cases that failure to object at the time of the giving of instructions and prior to the retirement of the jury precludes a party from urging error on appeal based on said instructions.*

Federal Rules of Civil Procedure

"Rule 51. Instructions to Jury: Objection.

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

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*Compare Rule 20 2(d) of the Rules of this Court.

The local District Court Rules of the District of Southern California, Central Division, reiterates the purpose of the basic Federal rule:

"Rule 14. INSTRUCTIONS TO JURY.

"(a) * * *

"(b) Instructions and Formal Objections Thereto:

"The jury shall be instructed by the court as provided in rule 51 of the F. R. C. P. Objections to a charge, or to a refusal to give as a part of such charge instructions requested in writing, shall be made by any party, by stating to the court before the jury have retired, that such party objects to the same, specifying by numbers of paragraphs the parts of the charge objected to, and the *requested instructions, the refusal to give which is objected to, and specifying the grounds of objection.*

"As to any charge given by the court on its own motion, the grounds of objection shall be specific. The clerk shall note any objection in the minutes of the trial if a reporter is not present. * * *" (Emphasis added.)

"This rule (Rule 51) requiring that party assigning error to an instruction given or not given must have objected thereto before jury retired, has as its purpose to require parties to enable trial court to clarify or correct his statement before the jury retires."

New York N. H. R. Co. v. Zermani (1953), 200 F. 2d 240, cert. den. 73 S. Ct. 729; 345 U. S. 917; 97 L. ed. 1351.

or as stated in *Stillwell v. Hertz Drive-urself Stations,* 174 F. 2d 714:

> "This rule was designed to preclude counsel from assigning as error on appeal matter at trial which he did not fairly and timely call to the attention of the trial court."

This Court is, of course, also committed to the uniform doctrine adverted to in Rule 51:

> "These instructions, not having been excepted to by either party, became the law of the case, and in determining whether the evidence was sufficient to sustain a verdict for plaintiff, we must test its sufficiency by the law as announced therein. *National Surety Corp. v. City of Excelsior Springs,* 8 Cir., 123 F. 2d 573, 577, 156 A. L. R. 422; *cf. F. W. Woolworth Co. v. Carriker,* 8 Cir., 107 F. 2d 689, 692."
>
> *State Farm Mutual Auto Insurance Co. v. Porter* (9th C. C. A.), 186 F. 2d 834.

To the same effect see:

Las Vegas Merchant Plumbers Ass'n v. U. S. (C. C. A. 9th), 210 F. 2d 732;

Thorp v. Am. Aviation & General Ins. Co. (1954), 212 F. 2d 821;

Allen v. Nelson Dodd Produce Co. (1953), 207 F. 2d 296;

Harlem Taxi Ass'n v. Nemish, 191 F. 2d 459;

Smith v. Welsh, 189 F. 2d 832;

Boston Ins. v. Fisher, 185 F. 2d 977;

Green v. Reading Co., 183 F. 2d 716;

Hansen v. St. Joseph Fuel etc. Co., 181 F. 2d 880, cert. den. 71 S. Ct. 89, 340 U. S. 865, 95 L. ed. 633.

The trial court in the instant proceedings by stipulation and agreement of counsel gave his instructions "orally and in logical sequence and in common speech so that laymen to be guided thereby will have an intelligent understanding of their true meaning." (*Downie v. Powers,* 193 F. 2d 760.)

It is clear from the proceedings after all of the evidence and prior to jury arguments that the procedure followed by the Court with respect to instructions was acquiesced in by counsel for both parties, and this acquiescence by counsel amounted in fact to an approval of the instruction procedure actually followed by the Court consisting of leaving it to the Court's discretion which of the more than 100 proposed instructions were to be given and the manner and sequence of the giving of such instructions. The Court's remarks on this occasion make the instruction procedure actually adopted clear and are as follows [R. 1220-1221]:

> "The Court: The settlement of instructions is always a difficult problem. It all too often bogs down into the niceties of language, and we find that instructions that are finally given are given more with an idea to appellate decision language than to helping the jury here.
>
> "There are over a hundred proposed instructions and some of them quite long. I suppose it would take a full court session if they were all given. I am wondering if, since there isn't a great deal of conflict—each side has in some instances asked for the very same instruction—if the court cannot simply read the charging language of the amended complaint, the relevant portions of the statute involved, give the classical definition of conspiracy and the necessity of finding that this defendant was a member of the particular conspiracy, and then get into dam-

ages doing it as best I can as a condensation from these long instructions you have given, and then call upon you to state your exceptions and if I have left anything out I will try to give it.

"That is what we have done generally in other cases, but this is the first antitrust case I have had to go to the jury.

"Mr. Black: I think we can work out some such formula [1312].

"Mr. Ackerson: I don't see any objection to that, your Honor."

The assignments of error of appellant numbered 5 to 10, inclusive, with the exception noted, refer to alleged errors on the part of the Court in instructing the jury to which no exception or objection was taken or made by appellant at the time the charge was given. It now for the first time seeks to raise alleged defects in the Court's charge contrary to the rule by merely calling this Court's attention to certain of its proposed instructions submitted to the Court prior to the time of trial. In each instance appellant admits that "no specific objection was made to the failure to give those instructions at the time when the Court instructed the jury" (App. Br. pp. 20-31, incl.). An examination of the Court's instructions as a whole makes it abundantly clear that each of the alleged errors now raised by appellant were adequately covered in the Court's charge. It is to be further noted that in no case does appellant allege the Court's failure to instruct, but only failure "adequately" to instruct. Thus, point 5 charges the Court failed "adequately to instruct the jury that it could return a verdict for plaintiffs only if it found that defendant Flintkote was a party to an unlawful conspiracy * * *" and failed "adequately to instruct the jury that defendant Flintkote was the only defendant

in the case." Appellant then proceeds to extract certain isolated and disconnected parts of the Court's instruction to illustrate its point (App. Br. pp. 21-22). The Court instructed the jury not once, but a number of times on both of these points, and read as a whole the instruction was clear and most favorable to appellant [R. 1233-1261]. After cautioning the jury that it must consider the instructions as a whole and could not single out any single instruction in arriving at its verdict, the Court pointed out in clear and concise language that Flintkote or any manufacturer had a legal right to select its own customers [R. 1235]; that in order for the jury to find a verdict against Flintkote it must find that it joined an illegal conspiracy under the antitrust laws [R. 1236]; that Flintkote was the only defendant before the Court though the Complaint was filed against many defendants, and that they were not to be concerned with what had happened in the case with respect to the other defendants—"we are trying the case here today as to this one defendant" [R. 1239]; that in order to hold Flintkote the jury must find an intentional participation by Flintkote in a transaction made with a view to further the common design—must find that Flintkote knowingly and purposely engaged in activities to forward the illegal scheme; that the jury must find that Flintkote joined and participated in the conspiracy with knowledge of its purpose and object and with intent to promote the same; that Flintkote as a matter of law would be privileged, acting independently and as a matter between itself and a proposed customer to refuse to deal with any customer [R. 1240-1241]; "that if the Flintkote Company acted in concert with anyone or more of the other defendants here, and the acting in concert was in violation of the law which I will read to you, then the conspiracy would be made out" [R. 1241-1242]; that

> "a primary question for you to consider is whether defendant Flintkote Company was a party to an un-

lawful contract, combination, or conspiracy in restraint of interstate commerce or to monopolize a part of such commerce. If you find that no such unlawful combination or conspiracy existed or that the Flintkote Company was not a party to any such combination or conspiracy, even if one did exist among others, you must return a verdict for the defendant and you need not consider any other questions"

(This latter instruction was a direct quotation from one of defendant's proposed instructions.) Continuing the Court instructed

"'In other words, one of the primary questions here is, was there a conspiracy and if there was, was the defendant on trial today a member of that conspiracy or was it acting independently of whatever the conspirators might have been doing.'"

The Court continued:

"If you find that the defendant, the Flintkote Company, knowingly agreed with one or more of the acoustical tile contractors named the defendants in this case, to restrict or prevent plaintiffs from competing with such acoustical tile contractors, you are instructed that this would be a violation of law and if you find that this violation resulted in damage to the plaintiffs' business or property, your verdict should be for the plaintiffs in the amount you find they have been damaged.

"The Flintkote Company can be liable for refusing to sell acoustical tile to plaintiffs only if such refusal to sell was in furtherance of and as a consequence of a knowing participation in an unlawful combination and conspiracy."

The latter quoted instruction was likewise taken verbatim from appellant's own proposed instruction. Finally, continuing the Court stated:

"In other words, we come back to the old principle that if the Flintkote Company was acting entirely on its own, without conspiracy with the other defendants, then there is no cause of action" [R. 1246-1247]. The Court further instructed the jury that a conspiracy cannot exist between a corporation and its own employees or agents, acting in such capacity, and that "accordingly, you may not base a finding of conspiracy merely upon any concert of action solely among the agents and employees of the Flintkote Company, and that "you cannot find that the Flintkote Company was engaged in an unlawful transaction, combination or conspiracy solely upon the basis that the fact that the Flintkote Company refused to sell or stopped selling acoustical tile products to plaintiffs" [R. 1248].

On this point the Court further instructed the jury that in addition to finding a conspiracy to unreasonably restrain or monopolize interstate commerce to the public injury [R. 1249, 1251] that "you must find in addition to that, before you can find for plaintiffs, that the defendant on trial here, the Flintkote Company, was an actual participant in the conspiracy and was not acting independently of the conspiracy and in its own interest acting alone" [R. 1252].

Even the foregoing extended excerpts from the Court's entire charge cannot give the complete fairness of the Court's charge when read as a whole. It is offered merely to illustrate the fragmentary and superficial nature of appellant's belated objections before this Court. See Record 1253-1261 for the Court's entire charge. The obvious approval of appellant to the instructions, as given, and the fact that no objections (to any of the matters now sought to be raised in this part of appellant's brief) were made to the Court will be shown hereinafter in this section

of appellees' brief by reference to the entire record as it pertains to the Court's invitation to both counsel to make objections and the failure of appellant's counsel to do so at the time. It is, of course, clear that the so-called objections contained on page 23 of appellant's brief are both inadequate and were, in fact, never intended to constitute an objection to the Court's instructions even at the time the statements were made by Mr. Black. For example, the first quotation by Mr. Black was made in an informal discussion with the Court in the nature of a pre-trial proceeding in chambers and constituted merely an observation by Mr. Black directed not at the Court's charge, but at certain typewritten proposed instructions which had therefore been submitted to the Court by appellees. There can be no contention here that any of the instructions (proposed) to which the remark may have been directed were used by the Court in charging the jury at the end of the case. For a better understanding of this informal conference, see Record 150-161. Similarly the second remark made by Mr. Black and quoted on page 23 of appellant's brief as constituting an objection was likewise made in an informal proceeding in the Court's chambers relating to a number of problems and was and purports to be nothing more than Mr. Black's observations that he *would make objections* to certain of appellees' proposed instructions in the event the Court adopted them in their then present form. It is also apparent that appellees' counsel made similar statements with respect to appellant's proposed instructions during the course of this informal meeting. Mr. Black's final observation quoted on page 23 merely refers to an inadvertent chance remark of the Court in general instruction on conspiracy law which obviously resulted in no confusion and was corrected many times as hereinabove pointed out in the course of the Court's instructions as a whole. In any event, it is obvious Mr. Black in no wise considered this

an objection to the Court's charge and made no request thereby that the Court correct any specific part of his charge.

Appellant's Point 6 (App. Br. pp. 23-27) was admittedly not the subject of an objection at the time the instructions were given and erroneously and belatedly alleges that the Court failed to instruct the jury nevertheless that only unreasonable restraints of trade are prohibited by the law. Again appellant quotes fragmentary and disconnected parts of the Court's instruction as a whole in an apparent attempt to obscure the patent fairness of the Court's charge in this respect. The Court's instructions on the point of unreasonableness are contained in the record, pages 1243, 1244, 1245, 1249, and elsewhere throughout the instructions as a whole. There, the Court instructed the jury as to the purposes of the law that a restraint of competition in commerce must be direct and intentional, that commerce is restrained if competition is hindered, obstructed, injured, or prevented; that an essential characteristic of monopoly is a wrongful exclusion of competitors from the field; that the elimination of competition in interstate commerce was unreasonable if the parties acted in concert and by conspiracy; that the law condemns the power and exercise of such power on the part of an organized group to eliminate competition; that the jury must find the existence of a conspiracy and combination to eliminate competition; that the jury must find that Flintkote knowingly agreed with one or more of the acoustical tile contractors to restrict or prevent plaintiffs from competing with such acoustical tile contractors, and that plaintiffs' business was damaged thereby; that the jury must find in order to hold for plaintiffs that there had been some appreciable harm to the public interest by finding that the restraint imposed brought about or was reasonably calculated to bring about an increase in prices to the consuming public, a diminution

in the volume of merchandise in the competitive markets, a deterioration in the quality of the merchandise available to the channels of commerce or some substantial consequence to the free flow of that commodity in commerce, etc. The latter instruction was taken verbatim from one of appellant's proposed written instructions.

> "Before you can conclude that a combination, agreement or concert constitutes an unlawful conspiracy or concert you must determine that its inherent tendency is to substantially lessen, hinder or suppress competition into the channels of trade or commerce or to monopolize trade or commerce with respect to the commodity here involved" [R. 1249].

It is clear from this part of the Court's instructions and from the instructions as a whole that the Court charged correctly and fairly that if the jury found that Flintkote combined and conspired with one or more of the contractor defendants to eliminate appellees' competition in the purchase, sale, and installation of acoustical tile by taking away appellees' only source of such tile purchased and received from Hawaii that that would constitute an unreasonable restraint of trade and commerce and would amount to a *per se* violation of the antitrust laws. The law is clear on this point:

Darnell v. Markwood, 220 F. 2d 374;

International Salt Co. v. United States, 332 U. S. 392, 68 S. Ct. 12;

Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d 721;

United States v. National City Times, 186 F. 2d 562; cert. den. 341 U. S. 916, 71 S. Ct. 735;

United States v. Socony-Vacuum Oil Co., 105 F. 2d 809.

This instruction was substantially made and is implicit and clear in the entire instruction of the Court. Indeed, as will be shown herein appellant's counsel made no objection to these instructions or to other points which it now seeks to raise and in fact approved such instructions as given.

Appellant's Point 7 argues for the first time before this Court that the instructions regarding the necessity of a finding of injury to the public as a prerequisite to a verdict for appellees was confusing or inadequate but admits that the jury was correctly given such an instruction at page 1249 of the record. Again, appellant admits that "defendant did not object to this error at the time when the instructions were given."

What has been said with respect to appellant's Points 5 and 6 is obviously applicable to this alleged point of error. Moreover, it is to be observed that the instruction directed expressly to this proposition contained on page 1249 of the record was taken from one of appellant's proposed instructions and would seem to be much more favorable to the appellant than the law permits or requires. We think it clear that the giving of this instruction proposed by appellant was neither justified nor necessary under the circumstances of this case since injury to the public is shown by proof of the intentional elimination of the benefits of free and open competition in the market place without more and without the further finding imposed upon the jury here to the effect that it must find that prices have been raised, quality deteriorated or amount of flow of interstate commerce restrained or diminished.

> "*And while abuses of price fixing and the like, not here directly involved,* have been the traditional criteria of illegality under the Act, there are other indicia of illegal conduct, 'of which exclusion of competitors from the market is one, *International Salt Co. v. United States*, 332 U. S. 392, 396, 68 S. Ct. 12, 92 L. ed. 20, which are condemned *per se* by

Section 2 regardless of whether or not the position of dominance has been exploited to rig prices', *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 1 Cir., 194 F. 2d 484, 486, 487. Moreover, it is not material under Section 3 that defendants are not themselves competitors of plaintiff if the combination of which they are a part nevertheless restrains competition between those who are competitors. *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219, 236, 68 S. Ct. 996, 92 L. ed. 1328.

"* * * * * * * *

"Appellees cite District of *Columbia Citizen Pub. Co. v. Merchants & Mfr's Ass'n*, D. C. D. C., 83 F. Supp. 994, and *Arthur v. Kraft-Phenix Cheese Corporation*, D. C. Md., 26 F. Supp. 824, as barring the action on the ground that the principal purpose of the antitrust laws is to protect the public. But the test is whether 'the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.' *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 500, 501, 60 S. Ct. 982, 996, 84 L. ed. 1311, and cases there cited. The Court quotes *Appalachian Coals v. United States*, 288 U. S. 344, 360, 53 S. Ct. 471, 77 L. ed. 825, as follows:

"'* * * only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.'

"See, also, *William Goldman Theatres v. Loew's, Inc.*, 3 Cir., 150 F. 2d 738, 743, *Id.*, 3 Cir., 164 F. 2d 1021, certiorari denied 334 U. S. 811, 68 S. Ct. 1016, 92 L. Ed. 1742. The restriction unduly prejudices the public interest when it is intended, as here

> alleged, to eliminate the competition of plaintiff by taking the steps enumerated to exclude him from all suitable and desirable office space, though, as we have said, substantial control and exclusion from such space would suffice." (Italics added.)
>
> *Darnell v. Markwood,* 220 F. 2d 374.

In any event it is clear that no objection was made to the charge as given and it is further clear from the instructions that in no event is it shown that appellant was prejudiced or that the instruction as given was not favorable to appellant. Finally, appellant admits (App. Br. p. 28) that "in fact, the Court in its instructions to the jury gave the substance of defendant's Instructions Nos. 30 and 32 [R. 1249]," and must admit that its proposed instruction No. 31 was likewise given in substance in a number of places in the Court's instructions to the jury. (See appellees' argument to Points 5 and 6, *supra.*)

Appellant's alleged points of error Nos. 8 and 9 are admittedly subject to the same infirmities herein pointed out in connection with Points 5, 6, and 7. In Point 8 appellant quotes three of its proposed instructions which were submitted to the Court in advance of trial and contends that the Court erred in failing to give such instructions even in the admitted absence of any valid objections by appellant. It is, of course, obvious from what we have said with respect to Point 6 that the substance of each of these instructions was in fact given, and here again, it is admitted that no objection to the Court's instructions were made with respect to the issue now sought to be raised before this Court.

Appellant's Point 9 seeks to raise before this Court for the first time an objection to the Court's instruction on the burden of proof by citing its proposed instruction on the subject and by referring to a brief colloquy between one of appellant's counsel and the Court in lieu

of the specific objection required by the rules. First it is to be noted that the Court's instruction as given was proper and adequate, and stated substantially the contents of appellant's proposed instruction No. 14 new. It would seem that this belated and unfounded objection is based solely upon appellant's preference for the use of their particular verbiage in this proposed instruction.

The Court in its instructions defined burden of proof at various times in its entire instruction to the jury. On pages 1234-1235 of the record the Court expressly instructed that "It is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegation by a preponderance of the evidence" and the Court went on to define the term "preponderance of the evidence" here and elsewhere in the instructions. Again, on page 1241 of the record the Court stated

> "The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with a rational conclusion otherwise."

Again on pages 1254 and 1255 the Court instructed the jury with respect to burden of proof as follows:

> "Now, in this matter you will recall that the court has said, 'He who asserts the affirmative of a matter must produce a preponderance of evidence.'
>
> * * * * * * * *
>
> "The person who asserts the affirmative on the case has to have a preponderance of evidence, which means there must be a little more evidence, at least a little more evidence on his side than on the other side, be-

cause if you find that it is evenly balanced, then the decision goes to the one who resists the case, not the one who is trying to establish the affirmative."

Appellant's Point 10 complains that the Court failed to instruct the jury in the language contained in its proposed instruction 42 relating to the necessity of appellees proving pecuniary loss or damage, and that this fact must be proved by a preponderance of the evidence. The proposed instruction also refers indirectly to an alleged necessity of a showing of public injury to which we have previously reverted in our prior argument, and to the contrary that there is no duty imposed by law upon a defendant to show that its acts have not worked injury to plaintiff. Here again, the relevant substance of appellant's proposed instruction was given by the Court in its own language. See pages 1254-1255 of the record quoted in the appellees' immediately preceding argument with respect to Point 9. See also the Court's instructions contained on the preceding page 1254 relating to the necessity of finding that any damages were the proximate result of the conspiracy.

On this point and after being invited to do so out of the presence of the jury appellant's counsel requested the Court for an additional instruction [proposed Instruction No. 45 new, R. 1257] which was given as requested [R. 1259]. After the giving of which and after an additional request from the Court for any criticism of its charge by counsel, Mr. Black, chief counsel for appellant, expressed his satisfaction on this latter point and offered no further objections to the instructions as given.*

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*We are excepting appellant's objection to the court's refusal to give Proposed Instruction 46A through F. The legal theory embodied in this proposed instruction will be treated in our discussion of damages.

In connection with appellees' argument with respect to alleged points of error numbered 5, 6, 7, 8, 9, and 10, the following portion of the record is conclusive of the extent of appellant's objections made at the time the instructions were given and of the extent to which appellant acquiesced and approved the instructions as given [R. 1256-1261].

"Now, counsel, the court will hear your exceptions to the charge.

"This is a duty that the law imposes upon the attorneys and upon the court. After the judge has instructed the jury, which, as you have observed, is a moderately lengthy process, and always subject to the possibility that the judge has overlooked something or has had a slip of the tongue, the attorneys may step around to the side of the bench, out of the hearing of the jury, and point out to me what they think (1488) my errors have been, and may suggest ways in which the instructions should be extended.

You may do that now.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury.)

Mr. Doty: For the record, I think we should have our 14 new on burden of proof, which said that the plaintiff has the burden of proof on all issues, and that in the event he does not sustain the burden of proof, they are to find for the defendant. I don't think that was ever stated.

The Court: There were many instructions submitted on that particular issue. I selected one and did not wish to repeat.

Mr. Doty: We believe that our instructions 46-A through 46-F should be given. It is on an entirely different theory of damages from the one stated, but

for the record, we would like to insist that they be given.

The Court: The insistence is noted and I have given them as far as I feel that I properly can.

Mr. Doty: I take it that it is sufficient if we specify 46-A through 46-F, without specifying which is new, because, obviously, we only want the latest version of those.

The Court: The court will protect you by saying that I understand the exception and I deliberately and knowingly decline to give all the instructions just mentioned. [1489.]

Mr. Doty: We also had an instruction 45 new, which was an additional instruction in connection with damages based on speculation and guesswork, which we feel should be given.

The Court: I had your instruction before me, but I thought a little extemporaneous one would tell them a little better. Do you think I missed it?

Mr. Doty: I don't think you got in the speculation and guesswork aspect of the thing.

Mr. Black: I think that is sound, your Honor. You don't have to be precise, but you just can't pull a figure out of the air.

The Court: I will read it. Hand me that.

Mr. Black: One other observation. I think it is more a matter of confusion than error. In one of the old instructions there were several defendants in the case, which was given, that stated the jury can bring in a verdict against any defendant they find guilty, which is inappropriate in this action. It might tend to confuse. I think that was inadvertently given that way.

The Court: I think I was reading Judge James' instruction at the time.

Mr. Ackerson: That was one of the suggestions I had, was, your Honor, I think we talked this over in chambers before, and I think you ought to give an instruction or a little clarification about the fact, in connection with the suggestion [1490] of Mr. Black's, that the fact of settlement, which has been mentioned to the jury, for income taxes or anything else, should not be taken into consideration any wise by them. They are still to return the same verdict they would otherwise.

Mr. Black: I think that has been adequately covered.

Mr. Doty: I think that has been adequately covered.

The Court: I don't recall that settlement has been mentioned.

Mr. Ackerson: Yes.

Mr. Black: It was by you at the outset, at the beginning of the trial. We agreed you would instruct it had been made. I don't think we need to repeat that.

Mr. Ackerson: They should take no consideration of that. I think that ought to be said now. It has been mentioned to them, but they should eliminate it from their minds and proceed as if it hadn't.

Mr. Doty: There is no sense in calling it back to their minds to eliminate. We told them at the outset to eliminate it from their minds.

Mr. Ackerson: I don't care.

Mr. Black: We might as well let it alone.

Mr. Ackerson: That is all I have. I have no other suggestion. I think you gave a very brief charge, but I can't think of anything you missed. [1491.]

Mr. Doty: I noted our 42 we thought should be given.

The Court: I understand that was in the series.

(Whereupon, the following proceedings were had in the presence and hearing of the jury.)

The Court: I overlooked one I had agreed with the attorneys to give.

The damages, if any, which you may award plaintiffs are not to be based on speculation or guesswork. Damages which you may award plaintiffs are to be just and reasonable and must be based only on such relevant factual data, if any, as was placed in evidence in this case.

The giving of this instruction is not to be taken by you as an indication that the court believes you should give any nor is my cautionary remark to be taken as an indication that I believe you shouldn't.

I am not expressing myself. I don't know who should win this case, and, hence, anything which might indicate to you a state of mind on my part, as to who should win, would be an erroneous interpretation by you, because I haven't figured it out. That is for you to do, and I have had enough problems here to figure out the things that are within my province.

Mr. Ackerson: Your Honor, I don't believe that last instruction is confusing, but the thought just occurred to me, with all due respect, that you may not speculate without telling [1492] the jury what latitude and leeway they may have, which does not constitute speculation. I don't want the jury to have the inference they have to be able to sit down and figure the amount of damage, if they so find, down to the penny or the dollar. They can use their best judgment, based on the evidence that is in the record.

The Court: In the nature of things, if a plaintiff wins in a case of this kind it is impossible, as I told you before, for you to have the data in a case of this kind from which you could take an adding machine and add up the damages with minute exactness.

But you must find some basis in the evidence for any damage which you award, and don't just, as one of the attorneys said here at the bench, draw a figure out of a hat.

Does that satisfy you, Mr. Ackerson?

Mr. Ackerson: Yes, your honor.

The Court: All right, Mr. Black, you can come up here if you—

Mr. Black: I am satisfied on that point.

The Court: Either of you may come up here and state privately any further amplification you think should be given.

All right. The clerk will swear the bailiff."

Authorities Cited by Appellant in Support of Its Points 5 Through 10 Do Not Apply Under the Facts.

Appellant's legal argument contained on pages 76 to 92 of its opening brief titled "B. The Court Erred in Its Instructions to the Jury" is necessarily premised on the untenable position assumed by appellant in its factual dissertation on the same subject (App. Br. pp. 20-21), and is, therefore, inapplicable to a situation where, as here, the court's charge correctly stated the law, was predominantly favorable to the appellant, stated in substance the very matters now objected to by appellant on this appeal, contained no demonstratable conflict in the charge as a whole, and where appellant admits that no proper objection was made to that part of the charge covered by these assignments of error. Certainly, appellant's mere

suggestion now that the Court's reference to "defendants" *might have* confused the jury does not state a conflict in the instructions given. Thus, the case of *Voss v. Becko,* 192 F. 2d 827, 830, and *Paramount Film Distributing Corp. v. Applebaum,* 217 F. 2d 101, cited by appellant in support of the proposition that conflicting instructions may be erroneous, have no application to a situation where in fact there was no conflict and where, as here, the instructions when read as a whole were clear and not objected to at the time they were given. In the *Voss* case (the conflicting instructions were obviously the subject of proper objections at the time they were given and were in fact directly contrary to each other. In one instruction the Court submitted to the jury the question of whether the defendant coerced the merchants to breach their contracts with plaintiff while at the same time instructing the jury that there was no evidence to justify a finding that the merchants were forced by defendant to breach their contracts. The reversal and remand in the *Paramount* case, *supra,* was based upon many factors, including outside influence on the jury, local prejudice against the defendants in the case, and prejudicial instructions given over proper objections. None of these elements are present here. There are only appellant's unsubstantiated, argumentative, and distorted assertions which cannot and do not detract from the fairness and non-prejudicial nature of the instructions which were in fact given and approved at the time.

We have no quarrel with the principle enunciated in the cases cited by appellant beginning with *Standard Oil Co. v. United States,* 221 U. S. 1, 31 S. Ct. 5, on page 82 of its brief and ending with *Paramount Film Distributing Corp. v. Village Theatre,* 228 F. 2d 721, on p. 84. The admitted restraint in the case now on appeal was, by the verdict and under the instructions, found to be the destruction of appellees' right to purchase and sell

accredited acoustical tile on a competitive basis for the purpose of eliminating appellees' competition with Flintkote's co-conspirators in the case. The unreasonable nature of such a restraint cannot be questioned and the appellees, under the facts, would have been entitled to an instruction that if the jury found that purpose and effect to exist, it would amount to a *per se* violation of the act. See the cases cited *supra*. Again, appellant made no objection to these instructions at the time they were given.

Appellant's further argument (pages 84 to 92 of its brief) is in the same vein. It is a mere attempt to apply general legal principles to the conclusions of appellant's counsel which find no support in the instructions as given and approved or in the evidence. In the latter case it is also clear that appellant is merely seeking to have this Court reweigh the evidence without even directing this Court's attention to such evidence. Again, the cases cited by appellant in this part of its brief are based upon a situation where "a proper request for an instruction was made" (App. Br. p. 88).

Finally, nowhere in this part of appellant's argument is it shown factually, nor could it be seriously contended, that appellant was prejudiced or could have been prejudiced.

There was no failure on the part of the Court to instruct as to the appellant's theory of the case. Its sole theory as reiterated in the brief and in the record was that it acted independently and for sound business reasons in terminating appellees' source of acoustical tile. The Court covered this theory on numerous occasions in the instructions by instructing the jury (1) that the defendant Flintkote could be liable only if the jury found that Flintkote acted in conspiracy with appellees' competitors, and that otherwise Flintkote had a legal right to refuse to sell appellees for any reason deemed adequate to Flintkote. This instruction was repeated throughout the Court's in-

structions as a whole and properly stated appellant's theory to appellant's obvious satisfaction and approval. In fact, these instructions were taken from appellant's proposed instruction.

IV.

The Court Did Not Abuse Its Discretion in Failing to Grant a New Trial on the Grounds (a) the Verdict Was Against the Weight of the Evidence or (b) That the Damages Fixed by the Jury Were Excessive.

(Specification of Error No. 11, App. Br. pp. 92-100, 115-133.)

Appellant's Specification of Error No. 11 claims error resulted when the trial court denied its Motion for a New Trial on the above grounds.

It is appellees' contention that the disposition of a Motion for a New Trial based as here upon the weight of the evidence is a matter entirely within the discretion of the trial court, and that its ruling granting or denying the same is not reviewable by an appellate court.

> "It has been frequently decided that the allowance or refusal of a new trial rests in the sound discretion of the trial Court, and its action in that respect cannot be made the basis of review by writ of error from this Court. (Cases cited.)" (*Holmgren v. United States,* 217 U. S. 509, 521, affirming 156 Fed. 439 (C. C. A. 9).)

Also, see *United States v. Socony-Vacuum Oil Company,* 310 U. S. 150, 247; *Mattox v. United States,* 146 U. S. 140; *Luke v. United States,* 84 F. 2d 711 (C. C. A. 5, 1936); *Mutual Life Insurance Co. v. Wells Fargo Bank, etc.,* 86 F. 2d 585, 588 (C. C. A. 9, 1936).

In *United States v. Shingle,* 91 F. 2d 85 (C. C. A. 9, 1937), this Court said (p. 90):

> "Assignment 36 is that the trial Court erred in denying appellants' motion for a new trial. This ruling was not assignable as error. *Fairmont Glass Works v. Cub Fork Coal Co.,* 287 U. S. 474, 481 * * *"

However, notwithstanding the procedural infirmity of appellant's Specification of Error No. 11, appellees contend alternately that appellant has failed utterly to show where in the record the evidence sustaining the trial court's action was inadequate or that the trial court's decision on the motion was otherwise assailable.

In order to avoid a duplication of argument and discussion here, this Court's attention is directed to appellees' argument in sections I, II and V of this Reply Brief. It is clear that this portion of appellant's brief insofar as the purported facts are concerned, is based entirely upon the appellant's bald attempt here to induce this Court to weigh a fragmentary part of the evidence to the exclusion of more pertinent evidence contained in the record.

It is also noteworthy that insofar as appellant's argument is concerned with respect to (a) above, it has cited no legal authority to support its right to raise the question on appeal. It is submitted that there is no valid authority permitting appellant to do so. The authority cited to support ground (b) above (App. Br. pp. 115-133) likewise is devoid of any adjudicated decisions supporting appellant's right to have this Court review this ground of the motion for a new trial. The cases cited in this portion of appellant's brief relate merely to general principles which are wholly inapplicable to the evidence in the instant appeal. Again, for the purpose of avoiding a repetition of argument contained elsewhere herein this Court's attention is directed to sections I, II, and V of appellees' brief.

V.

Appellees' Answer to Contention That "Damages Were Excessive" and to the Contention That "Numerous Errors Were Committed in Connection Therewith." (Points 11, 12, 13.)

Alleged Excessiveness of Verdict Is Not Reviewable.

In its argument under this point appellant asserts that the damages assessed by the jury ($50,000) are excessive. It is clear that there can be no doubt of the fact of damage since that part of the conspiracy aimed at appellees had as its sole and only object, purpose, and effect the permanent elimination of appellees' ability to compete in the market place with Flintkote's co-conspirators. The latter element—the fact of damage—is not disputed in the record and is ignored in the argument of appellant.

The verdict of a jury based on evidence as to the amount of damages suffered is not reviewable by a Federal Appellate Court. The law on this subject is carefully stated and reviewed in *St. Louis Southwestern Ry. Co. v. Ferguson,* 182 F. 2d 949, where Judge Johnsen, speaking for the Court, says [954]:

> "The final contention is that the verdict is so grossly excessive as evidently to have been the result of sympathy, passion and prejudice. We have said many times that the excessiveness or inadequacy of a verdict is not a question for our consideration, but that the entreaty for any such vice lies solely to the judgment and the conscience of the trial judge on motion for new trial. This is because the amount of a verdict is primarily a factual evaluation on inabsolute elements, while our function traditionally has been regarded as extending only to a testing

of the soundness of the processes by which such a result has been achieved."

To the same effect see: *Lawlor v. Loewe,* 235 U. S. 522.

As a general rule in tort cases it must be recognized that it is the exclusive function of the jury to fix the amount of damages, and that Courts will not interfere with the jury's verdict merely because the amount of the verdict is large or because they take a different view of the case or would have awarded more or less damages.

Thornwalt v. Reading Co., 79 Fed. Supp. 921, 15 Am. Jur., Sec. 205, p. 622;

Barry v. Edmonds, 116 U. S. 550, 6 S. Ct. 501;

Tenant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409.

As has been pointed out *the fact* of damage is clear and cannot be controverted herein. An analysis of appellant's argument will disclose that its sole contention relates to the measurement of damages.

When damage is caused by a tortious act, the damage from the tortious act may continue in the absence of proof of a continuation of the conspiracy itself which caused the damage or injury. Thus one must distinguish between the cause of damage and (1) the time during which such damage may continue and (2) the amount of damage resulting from the tortious act. To illustrate, it has been held in certain motion picture cases, and correctly so, that the damage resulting from a conspiracy to prevent the plaintiff from playing pictures on a competitive run and availability is measured from day to day and is governed by the applicable statute of limitations and the damage proceeds only to the date of the filing of the complaint. On the other hand, when a single act of a conspiracy causes the damage to an individual theatre,

the time element and the measure of damage is vastly different. Thus we have the *Bigelow* case which involved the former principle (*Bigelow v. RKO Radio Pictures, Inc., et al.,* 327 U. S. 251). There the plaintiff sued for damages based upon a late playing position and was permitted to recover damages accruing within the statute of limitations and up to and including the date of filing of plaintiff's complaint. Subsequently and after approximately three years of appeal, plaintiff filed an entirely new suit and recovered damages during the later period upon the basis that the conspiracy continued during such period to his damage. The other type of situation is illustrated in the *Brookside* case. See *Twentieth Century-Fox Film Corporation, et al. v. Brookside Theatre Corporation,* 194 F. 2d 846, 854-855. In the latter case the plaintiff was compelled to dispose of his theatre to one of the defendants in the year 1937, as a result of the overt acts of the conspiracy preventing plaintiff from playing motion pictures in competition with competitors. No amended or supplemental complaint was filed in the case, the damage being based upon a single overt act in the conspiracy; namely, the compulsion under which plaintiff disposed of its property, the Brookside Theatre. The trial of the case ended on December 28, 1950, after having been transferred from this district to the Western District of Missouri for trial. Thereafter final briefs to the Eighth Circuit Court of Appeals were filed on September 17, 1951, and the instructions of the trial court were expressly brought into issue; the Supreme Court of the United States denied certiorari. (343 U. S. 942, 96 L. Ed. 1348, 72 S. Ct. 1035.)

The *Brookside* case is in no wise an isolated opinion or rule of law, but rather it states the regularly accepted and universal rule of law excepting only in those cases in which the damage is suffered day by day as a result of a continuing day by day conspiracy. For example, in cases

where plaintiffs have been prevented from going into business at all, the Court has held that the estimated future damage resulting may be approximated upon the basis of any adequate evidence. Thus in *Pennsylvania Sugar R. Co. v. American Sugar R. Co.,* 166 Fed. 254, 260, the Court held that while something more than a mere intention to go into business was necessary; that when that intention has been expressed in substantial acts, an estimate of the amount of money actually lost in the enterprise cannot be regarded as wholly speculative or problematical.

Again, in *Aladdin Mfg. Co. v. Mantle Lamp Co. of America,* 116 F. 2d 708, 716, 717, the Court held that

> "A tortfeasor is liable for all consequences naturally resulting, all injuries actually flowing from his wrongful act, whether in fact anticipated or contemplated by him when his tortious act was committed.
>
> "Recoverable damages, therefore, include compensation for all injury to appellant's business arising from wrongful acts committed by appellee, provided such injury was the natural and proximate result of the wrongful acts (citing cases). This includes injury to business standing or good will, loss of business, additional expenses incurred because of the tort and all other elements of injury to the business. 15 Amer. Jur. secs. 133, 134, 135, 136 and 138. These are governing principles applying to compensatory damages. * * * Whether damages be compensatory or exemplary, if unliquidated, when determined by the trier of the facts, their propriety cannot be governed or measured by any precise yardstick. They must bear some reasonable relationship to the injury inflicted and the amount must rest largely in the discretion of the trier of facts, a discretion not to be arbitrarily exercised. Ordinarily

> this court will interfere only where it appears that an injustice has been done or it is clear that there has been error in law."

In other words, once having found the *fact* of damage, the jury in a treble damage action may use its discretion as to the amount of damage in the identical way in which such discretion is used in a personal injury case and similar matters, including the future period of time in which the damage may persist.

In the *Brookside* case, *supra,* the Circuit Court of Appeals for the Eighth Circuit stated:

> "The measure of such damages is the pecuniary loss to plaintiff's business or property resulting approximately from the conspiracy or combination * * * The uncertainty, however, which precludes the recovery of particular damages is uncertainty as to whether they are the result of the tortious acts of defendant, rather than uncertainty as to amount, and the fact that damages cannot be calculated with mathematical exactness does not make them so uncertain as to bar recovery (citing cases). Hence, loss of profits may constitute an element of recoverable damages where they are capable of being measured or ascertained on a reasonable basis."

In the same case the defendants or appellants objected to the admission of evidence showing loss of future profits, maintaining that future profits in themselves are not an element of recovery, and that:

> "The amount of the profits beyond a reasonable period after the sale (of the theatre) in 1937 should not be considered."

The trial court permitted the plaintiffs (in *Brookside*) to estimate damages up to and beyond this point and for a number of years after the filing of the complaint

and trial. Appellate court approved the instruction given in this respect (certiorari denied by the Supreme Court).

Other statements of the principle involving the time element in which unliquidated damages may be considered and proven are numerous. See for example: Restatement of the Law-Torts, pages 906-908, where it is stated:

> "In determining the measure of recovery * * * a balance sheet is in effect set up by the court in which are stated the items of assets and liabilities which have been affected by the tort, (a) before the tort, and (b) as they appear at the time of trial. * * *"

The Appellate Court in the *Brookside* case further recognized this proposition of future loss of profits by the following language:

> "The value of the right to continue business, of which the plaintiff was deprived by the wrongful act of the defendants, depended certainly to some extent on its capacity to make a profit. * * * If profits might reasonably be realized from a conduct of a business destroyed by the tortious act of the wrongdoer may not be taken into consideration in ascertaining damages, then the wrongdoer might with impunity destroy a competitor's business and profit by such act."

See for example, *Allison v. Chandler,* 11 Mich. 542, where through repeated tortious acts plaintiff was compelled to abandon his business and sued to recover damages, including lost profits to the end of his leased term. See also *Chapman v. Kirby,* 49 Ill. 221, cited and approved in *Weinman v. de Palma,* 232 U. S. 571.

Finally, Mr. Justice Cardozo in *Sinclair Refining Co. v. Jenkins Petroleum Process Co.,* 289 U. S. 689, stated:

> "At times the only evidence available may be that supplied by testimony of experts * * *. But a

different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages and forbids us to look within."

Here, as in the *Brookside* case, the damage to appellee's business and property was accomplished by the act of the defendants on or about February 19, 1952. The results of said act (the termination of plaintiff's supply of competitive tile) and the damages therefrom have continued and have been accruing to the present date. Indeed, under the instructions in the *Brookside* case, it would seem that since there is no limitations other than ordinary mortality tables upon which to judge the time in which plaintiffs might have continued to operate their business profitably in the absence of defendants' acts there would seem to be no valid reason to compel the trial court here to limit the damages to the time of trial. In a motion picture treble damage action the damages are usually measurable upon the basis of the location, size, and accompaniments of the particular theatre directly involved, irrespective of the lease or the longevity of management or ownership. Thus, laying the two cases side by side, they can be distinguished only by the fact that whereas the plaintiffs in the *Brookside* case were permitted to prove continuing loss of profits and other damage elements up to and including the end of their lease on the Brookside Theatre which terminated in the year 1952, in the present case appellees' business rather than being predicated upon a particular building and its desirability or upon a particular lease of that building, is predicated upon their continuing ability to engage in the acoustical tile business and the continued utilization of their past experience, etc.

The following are general illustrations of types of damage recognized in antitrust cases:

It is settled that the injury to business or property referred to in the antitrust acts including diminution of property as a result of having been led to pay prices in excess of those which would have prevailed but for the illegal combination or conspiracy.

Montague & Co. v. Lowry, 193 U. S. 38;

Chattanooga Foundry v. Atlanta, 203 U. S. 390;

Thomsen v. Cayser, 243 U. S. 66;

Straus v. Victor Talking Machine Co., et al., 297 Fed. 791;

Monarch Tobacco Works v. American Tobacco Co., 165 Fed. 774.

As said by Justice Holmes in the *Atlanta* case,

> "A man is injured in his property when his property is diminished" (p. 399).

In the *Montagu* case, *supra,* plaintiff retailer was compelled to pay higher wholesale prices as a result of a retail association's activities. In an action against the association he was permitted to measure his damages on the tile which he had purchased by the difference between the list price and the association price, approximately fifty per cent off list.

Again, in the *Atlanta* case, *supra,* plaintiff's damage was measured by the difference between the price he had to pay and the price he would have had to pay under natural conditions had the combination been out of the way.

In *Thomsen v. Cayser, supra,* plaintiff's damages were based upon the difference between the rates charged by the combination and those which he would have otherwise been required to pay.

In the *Straus* case, *supra,* plaintiffs were retailers (principally Macy's of New York) to whom defendants had refused to sell goods at dealers' discounts because of Macy's refusal to participate in defendants' illegal licensing scheme. In order to obtain goods, Macy purchased both from defendants and others at a higher price and the same measure of continuing damages were used.

Again, in *Eastman Kodak Co. v. Southern Photo Co.,* 273 U. S. 359, plaintiff's established business of selling supplies to professional photographers was greatly decreased by the refusal of the defendant, which had a partial monopoly in such supplies, to sell to it. In this case, the defendant conceded that the loss of anticipated profits may be recovered where the amount of loss is made reasonably certain by competent proof. The Supreme Court adopted the language of the Court of Appeals as a correct statement of the applicable rules of law:

> "The plaintiff had an established business, and the future profits could be shown by past experience. It was permissible to arrive at net profits by deducting from the gross profits of an earlier period an estimated expense of doing business. Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate."

Further, the Supreme Court added:

> "* * * a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. *Hotel v. Baltimore & Ohio R.R.,* 169 U. S. 26, 39. And see *Lincoln v. Orthwein* (C. C. A.), 120 Fed. 880, 886.

"We conclude that plaintiff's evidence as to the amount of damages, while mainly circumstantial, was competent; and that it sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. The jury was instructed, in effect, that the amount of the damages could not be determined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference" (p. 379).

Normal anticipated increase in future business, where a plaintiff has been either stopped from conducting business or substantially restricted, is a recognized measure of unliquidated damages in suits of this kind, and the measure of this loss may be proven by expert testimony, including plaintiffs' own opinion based upon some reasonable thesis. Thus, in *Sheldon v. Moredall Realty Corp.*, 29 Fed. Supp. 729, 732, directors and managers of similar theatres in the neighborhood of the Capitol Theatre testified as experts for the respondent on the added patronage a motion picture theatre might get by supplementing its program with vaudeville, the Court holding according to the general rule that any objection to this type of evidence related solely to its weight, not to its admissibility.

The case of *William R. Rankin Co. v. Associated Billposters, etc.*, 42 F. 2d 152 (C. C. A. 2) is another example of plaintiffs using expert testimony and judgment in estimating damages. There the plaintiff was prevented from engaging fully in the outdoor billboard business because of the tortious acts of defendants. The Court permitted Rankin, the plaintiff, to testify and give his best estimate, not only of the loss occasioned by those acts, but as to damage occasioned by his loss of what he considered would have been the normal increase in his business from year

to year in the absence of such tortious acts. He was permitted to estimate on this basis his probable yearly earnings to explain how his figures were arrived at. The Court stated with respect to this type of testimony:

> "There was no speculation as to the fact of actual damage, its business had been seriously curtailed. The defendants had caused the damage, and cannot be permitted to escape liability because it is difficult for the plaintiff to express in terms of dollars the damage it has suffered.
>
> "This evidence while purely an estimate and introduced as such was proof of a kind of definite and certain as the subject matter admitted. It had to do with what was never actually earned because of the defendants' wrongdoing. * * * Whatever may be said of its weight and that was entirely for the jury, we have no difficulty with its admissibility."

In the case of *Frey & Son. v. Welch Grape Juice Co.,* 240 Fed. 114, 117, the District Court limited the measure of damages to the profit the plaintiff would have made on two particular orders proved to have been given to the plaintiff which it was unable to fill. The Appellate Court denied this limitation and stated:

> "This damage could not as a matter of law be confined to the loss of profits or specific sales which the plaintiff might be able to prove; for in such case when a merchant's business is broken into, it would ordinarily be impossible for him to know and prove all specific sales he had lost."

Again, with respect to "normal expected increase in business" in the case of *Johnson v. Joseph Schlitz Brewing Co.,* 33 Fed. Supp. 176, 182, the Court stated:

> "Among the many other items of damage properly assessable, improved trade for plaintiff if the restraint were removed is one."

Citing

Montague v. Lowry (9th C. C. A.);

Ellis v. Inman Poulson & Co. (9th C. C. A.); and

Story Parchment Co. v. Patterson Co., 282 U. S. 555.

See also regarding latitude of proof of damage, *Speegle v. Board of Fire Underwriters,* 29 Cal. 34, 46, citing and quoting *Bigelow v. RKO Radio Pictures, Inc., et al.,* 327 U. S. 251.

The Circuit Court of Appeals' opinion in the *Brookside* case, *supra,* recognizes the foregoing established principles of law. There, as here, the appellant in arguing the question of admissibility of certain evidence commingled with criticisms of the Court's instruction and ultimately in this connection argued the question of alleged excessiveness of the verdict (p. 855). There, as here, the question of the measure of damages was based largely, if not entirely, upon the testimony of expert witnesses operating similar types of theatres and the Court stated with respect to similar objections as are raised here:

> "* * * After testifying that he had made a study of the records that were exhibited covering this period of operation, he was interrogated as to the gross receipts for each of the years. This was objected to on behalf of the defendants as being 'inadmissible on any subject of damages and further that the profits themselves are not any element of recovery and that the amount of the profits beyond a reasonable period after the sale in 1937 should not be considered.'"

With respect to the measurement of damages the Appellate Court in the *Brookside* case further stated:

> "* * * The measure of such damages is the pecuniary loss to plaintiff's business or property re-

sulting proximately from the conspiracy or combination. They must be actual damages and not speculative or conjectural. The uncertainty, however, which precludes the recovery of particular damages is uncertainty as to whether they are the result of the tortious acts of defendants, rather than uncertainty as to amount, and the fact that damages can not be calculated with mathematical exactness does not make them so uncertain as to bar recovery. *Bigelow v. RKO Radio Pictures,* 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652; *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684. Hence, loss of profits may constitute an element of recoverable damages where they are capable of being measured or ascertained on a reasonable basis."

Finally, the Court there stated:

"* * * In view of the verdict of the jury we must assume that plaintiff was forced out of business by the tortious acts of the defendants. True, the cause of action for such wrongful acts arose at the time such wrongful acts were consummated,* and plaintiff could at any time thereafter, within the period of limitations, have sued to recover the damages suffered."

In *Bordonaro Bros. Theatre v. Paramount Pictures, et al.,* 176 F. 2d 594, the Court held in a motion picture case that:

"Damages in such a situation necessarily cannot be asserted with mathematical precision; but the testimony of plaintiff's expert witness, Samuelson, 'while purely an estimate and introduced as such, was proof

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*Here the wrongful acts were consummated on or about February 19, 1952.

of a kind as definite and certain as the subject-matter admitted.' *William H. Rankin Co. v. Associated Bill Posters of U. S. and Canada,* 2 Cir., 42 F. 2d 152, 155, certiorari denied *Associated Bill Posters of U. S. and Canada v. William H. Rankin Co.,* 282 U. S. 864, 51 S. Ct. 37, 75 L. Ed. 765. Defendants must not be allowed to create their own immunity by the extent and duration of their conspiracy."

The principle is also well established that "in action for damages for exclusion from business controlled by defendants damages suffered after decree finding defendants guilty may be recovered thereof resulting from unlawful acts done before such decree." On the general principle enunciated in *Lawlor v. Lowe, supra,* and similar cases, see also *American Mine Workers of America v. Dowd,* 242 U. S. 653, 37 S. Ct. 246; *American Banana Co. v. United Fruit Co.,* 166 Fed. 261 (affirming 160 Fed. 184), and similarly see *Speagle v. Underwriters,* 29 Cal. 34, 36.

Again, in the recent case of *Kobe, Inc. v. Dempsey Pump Co., et al.,* 198 F. 2d 416, cert. den. 73 S. Ct. 46, the Court followed the uniform doctrine with respect to measurement of damages in tort actions.

"* * * *To sustain the amount of the damage, Dempsey and Specialty produced all the evidence available under the circumstances. They showed that they had the facilities, the personnel and the finances to manufacture and market the Dempsey products.* They had elaborate surveys and samplings of the market and the demands for this product prepared by experts. One expert with long experience in the field in marketing hydraulic pumps and who knew the Dempsey pump and its performance as compared *with others, testified that in his opinion Dempsey would have sold considerably more pumps and auxili-*

ary equipment than that allowed by the court had there been no interference on the part of Kobe. These experts believed that the growth curve of the Dempsey product would have continued upward over the period in question principally because of the pump's performance and its price. In view of all the evidence, including the fact that during the relevant part of 1948, Kobe averaged 45 installations per month and 23 per month for all of 1949, it would appear that the trial court took a conservative estimate when it found that except for the Kobe interference, Dempsey and Specialty would have sold six of the smallest and lowest priced pumps per month for the period in question." (Emphasis added.)

In *Bigelow v. RKO Radio Pictures Inc., et al.,* 327 U. S. 251, 66 S. Ct. 574, 99 L. Ed. 652, a leading case on the measure of damages, plaintiff sued for treble damages under the antitrust act, claiming that defendants, by conspiracy, had prevented plaintiff's theatre, the Jackson Park in Chicago, from playing on the run to which it was entitled. Plaintiff claimed that the measure of his damage was the benefit that he would have made if he had been allowed to operate his theatre on the run to which he claimed he was entitled. To prove the amount of this loss, he introduced comparison figures of other theatres and of his own theatre. The District Court allowed the damage claimed, but the Circuit Court of Appeals reversed on the ground that the damage claimed was too speculative.

The Supreme Court, in reversing the Seventh Circuit Court of Appeals and directing reinstatement of the judgment of the District Court, pointed out that *"the fair value of petitioner's right thus to continue their business depended on its capacity to make profits."*

The Court pointed out that it was resting its decision on settled principles of law, and that in cases of this character, where the tortious acts of the defendants preclude a more precise ascertainment of the damages, every principle of justice and public policy requires that the wrongdoer bear the risk of the uncertainty involved. Note carefully the Court there speaking of a case where there were no evidential facts upon which to compute the amount of lost profits except *comparison* of other theatres with plaintiff's theatre.

While the cases are legion on the point of measurement of damages, this Court's attention is directed to the case of *People's Ice Co. v. Steamer Excelsior,* 44 Mich. 229, for a most enlightening and complete discussion and answer to appellant's position here. The quotation is not quoted herein because of its length, but the Court's attention is expressly directed to the Court's comments commencing at page 236 of the opinion.

In *Chapman v. Kirby,* 49 Ill. 211, cited with approval and followed in *Weinman v. De Palma,* 232 U. S. 571, 34 S. Ct. 370, 58 L. Ed. 733, plaintiff's business, conducted on leased premises, was interrupted by wrongful act. Chapman, confronted with the inability to operate, *sold* his plant and *closed* out his business and sued to recover his damage, claiming that such damage consisted of the profits he would have earned except for the interruption and destruction of his business. His contention was sustained.

> "It cannot be held that, * * * appellee should remain inactive, hold his machinery, unfinished stock and fixtures, until the end of his term, * * *. *No rule of law or principle of justice could require such a course.* * * * The person thus wronged is entitled to recover, for all of the injury he has sustained. * * * And of what does this loss consist, but the profits that would have been made had

> the act not been performed by appellants? * * * Nor is there any force in the objection, that appellee was confined to the value of his lease from the time the power was withheld * * *. Appellees had sold out, his business was destroyed, and he was not bound to re-establish his business, when he had no assurance that it could be continued during the remainder of his term. * * * *He was not bound to suppose appellants would be more disposed to regard his rights in the future than they had been in the past.*" (Emphasis added.)

Appellant's Authorities Are Inapplicable.

Authorities cited by appellant are not contrary to the established law as it applies to the facts in the case at bar. For example, the *Lawlor* case, the *Connecticut Importing Co.* case (App. Br. p. 101), and the *Frey & Son* case (App. Br. p. 104) all recognize the proposition of law that a plaintiff in a treble damage action may recover damages for all injuries flowing from any act occurring prior to the filing of the complaint, whether the damage continues to or beyond the actual trial date of the case.

The motion picture cases cited by appellant have been distinguished hereinbefore in that they apply to a situation where there is in fact a day to day refusal to sell or license a motion picture to an exhibitor for exhibition on the day or days requested. They do not involve a termination of supply of motion pictures nor a refusal to sell or license. They involve merely a day to day or week to week refusal to license the pictures on the basis desired by the exhibitor. Hence, they are not in conflict with cases cited by appellees and are inapplicable to a situation such as here where appellant by a single overt act of the conspiracy—the act of terminating permanently appellees' source of supply—was the single and only act causing appellees' injury. Therefore, it is immaterial for the purposes of this appeal

that the conspiracy to monopolize and control the sale and installation of acoustical tile may have been a continuing one or may in fact still exist. The pertinent point is that appellees' damage was occasioned by a single overt act of that conspiracy.

By and large Flintkote's argument with respect to damages ignores the obvious finding of the jury that Flintkote knowingly and illegally participated in a conspiracy to eliminate appellees' competition in the purchase and sale of acoustical tile in the area involved. In its argument appellant thus seeks to ignore the direct and inevitable and intentional effect of its individual acts in furtherance of the conspiracy by directing this Court's attention only to an alleged insufficiency of the evidence to show Flintkote's knowledge of other aspects of the overall conspiracy as it related to bid allocation and price fixing among the co-conspirator contractor defendants.

Summary of Evidence on Measurement of Damages.

The verdict of the jury in the amount of $50,000 is not only supported by the evidence, but there is no evidence to the contrary. *Appellees were the only ones who offered any evidence on the amount of damage suffered.*

The record in the instant case shows little, if any, dispute with respect to the following evidence regarding the measurement of damages suffered by appellees:

(1) Appellees spent considerable time and effort in the San Bernardino area and in the Los Angeles area in promotional and organizational work in setting up the aabeta co. [R. 216-217]; (2) there was no attempt by appellant during the course of the trial to rebut the former sales capacity of either appellee based upon past sales experience of approximately one carload of acoustical tile per month; (3) there was no effort or attempt during the course of the trial or in the record to rebut the formula

testified to by appellees with respect to the profits and sales commissions resulting from the sale of a carload of acoustical tile; namely, $5400 out of $18,000 derived from the installed price of a carload of acoustical tile; (4) there was no substantial dispute regarding appellees' or either of the appellees' past performance, expertness, or ability as acoustical tile salesmen; (5) there is absolutely no dispute in the record regarding the fact that appellees were incapacitated insofar as their ability to compete without an assured direct source of approval acoustical tile after February 19, 1952 [R. 270-276, 1210-1211]; (6) there was no dispute in the record or any attempt to dispute appellees' evidence regarding the fact that they were compelled to pay 17% more for an uncertain and non-competitive source of acoustical tile after their direct source had been permanently terminated on or about February 19, 1952; (7) there was no attempt during the course of the trial to attack the validity or the accuracy of Exhibits 38 and 39 either with respect to the formula represented there or the supplementing expert testimony of appellees with respect to such formula of profit. This, in spite of the fact that appellant called as its own witnesses the representatives of all of the contractor co-conspirators excepting only principal representatives of the Downer Company—appellees' former associates. (8) The fatuous nature of appellant's argument charging that appellees during the period from July, 1952, up to and including the date of the trial, sold less than a single carload of tile per month is, of course, apparent in view of the fact that they were compelled to rely upon "bootleg" sources at enhanced and noncompetitive prices, consisting largely of competing tile contractors for an uncertain source of acoustical tile. In other words, they were during this period operating under the admitted restraints of the conspiracy.

The jury's verdict of $50,000 was in view of all of the circumstances a most conservative one. In weighing the

evidence as it had a right to do, the jury obviously discounted many of the admissible and relevant factors going into the measurement of the damages actually suffered.

Accepting the undisputed testimony in the record that the average carload of acoustical tile purchased directly from the manufacturer at the uniform price prevailing throughout the area, has an installed price of approximately $18,000, and that 30% of this $18,000 consists of 10% overhead costs, 10% net profit to the contractor, and 10% sales commission, the net past admitted sales performance of each appellee in an amount in excess of $1200 per month would represent an approximation of a sale by each appellee, based upon past performance, of one carload of tile per month. The undisputed evidence further shows that each appellee would have, under his own business management, continued to sell not less than his past sales for other companies, and that each appellee would have received not only the 10% sales commission constituting his past earnings of $1200 per month, but would have also received a like amount constituting the net profit to the acoustical tile contractor, or at least double the amount of $1200 per month, or for both appellees a profit of $4800 per month. In any event, the jury's verdict of $50,000 found ample support in the evidence without regard to the undisputed expert testimony with respect to the normal growth of appellees' business, and the jury by its verdict kept well below the minimum damage based upon the sale of only one carload of tile per month by both appellees.

The conservative character of appellees' testimony and Exhibits 38 and 39 with respect to damages arising out of lost profits is illustrated by way of comparison with an examination of appellant's Exhibit J which shows that the defendant Acoustics, Inc., a relatively inexperienced newcomer in the acoustics field, sold during the first partial year of 1952 approximately $64,000 worth of

Flintkote tile in addition to its sale of Firtex, a competing approved tile [R. 838-839, 851]. $64,000 equals the price of approximately 12 carloads of tile [R. 1079-1081]. It is submitted that with appellees' admitted experience, contacts, and proven ability [R. 1062] their sales potential was at least as great as Acoustics, Inc.

It is true that suit could have been brought immediately and the damage which appellees had suffered as a result of Flintkote's tortious act estimated and fixed by the jury on the best evidence then available. The amount of damage appellees had suffered by being driven out of the competitive market does not continue to accrue or enlarge year after year *ad infinitum;* it never changes; it is neither enlarged nor diminished by the date of filing suit or the date of trial. In the instant case the trial court and the jury terminated the measure of this damage as of the date of the trial—under the law it need not have been so terminated, but the jury may have been permitted to find damage so long as the evidence in the case may have indicated that the appellees would continue to try to do business as a partnership in the future, even beyond the date of the trial.

At the time of trial it is clear that appellees were still operating as a partnership, were still under the competitive limitations resulting from the conspiracy; were still attempting to "keep their heads above water" by the purchase and installation of tile for which they were admittedly compelled to pay a high and non-competitive price for an uncertain supply, were continuing to operate as a partnership by resorting to other lines of building activity to supplant their acoustical tile business for which they were qualified and which had been destroyed by the conspiracy. It is also undeniable that at the date of trial appellees were still disabled, through lack of an assured source of A. M. A. approved tile to bid or otherwise compete for the large jobs from contractors they

had regularly and successfully dealt with in the past. Therefore, the element of speculation as to the amount of damages, which at the time of trial, may have been suffered in the future as a result of the appellant's acts was eliminated by the Court's decision to limit damages to the date of the trial. It will be further noted that other features of damage which originally may have been speculative had been eliminated at the time of trial as compared to what would have been the duty of the jury had the case been tried immediately upon the filing of the complaint or at the time when the act resulting in damage occurred in February, 1952. At the latter date the jury would necessarily have had to speculate on the following elements of damage which were not present at the time of the actual trial; namely (1) whether or not the appellees would continue to function as an expert partnership; (2) whether or not appellees would or would not have been able to obtain a direct line of supply from other manufacturers of A. M. A. approved acoustical tile; (3) whether or not the partnership may have discontinued for other reasons, and (4) whether or not the partnership may have been terminated or rendered unfeasible by reason of the death of one partner, or for other reasons.

Actually, the Court's charge to the jury with respect to damages was eminently fair and considerate of appellant. The Court charged that the jury could not take into consideration any punitive damages resulting from public injury or otherwise; that in any event they could compensate appellees only for loss to their business, and that the jury could not take into consideration any idea of punishment [R. 1250]. The Court further charged that even if the jury found for plaintiffs their finding as to damages must be limited only to the finding of actual damages which plaintiffs have suffered as a result of the conspiracy; that the plaintiff in an antitrust action can

recover damages for injury to its business or property which does not include damages for embarrassment, humiliation, etc.; that the defendant is liable only for all consequences naturally resulting, or injuries flowing from his wrongful act; that recoverable damages for such wrongful act would include compensation for all injury to plaintiffs' business arising therefrom provided such injury was the natural and proximate result of said wrongful acts; that if the jury found that this was a case for damages they should bear in mind that the damages would be limited to compensation for injury to plaintiffs' business arising from the acts of the defendant; that these damages could include injury to business, standing, or good will, to loss of business which would otherwise have been enjoyed by plaintiffs, to additional expenses incurred because of the tort; that "plaintiffs' recovery in this action, if any, must be limited to damages resulting from the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis during the period February 19, 1952, to the time of the beginning of the trial" [R. 1251-1254]. As has been pointed out elsewhere in appellees' brief, these instructions were not objected to and were in fact therefore approved by appellant except insofar as appellant's proposed instructions 46A-46F involved an entirely different theory of law [R. 1257]. Finally, it is apparent that the entire issue in the case revolved around the sole question of whether Flintkote's tortious act of terminating appellees' source of supply was the result of conspiracy or otherwise. This being so, the issue was a simple one, and the Court's instruction to the effect that damages, if any, could only be assessed between the dates of February 19, 1952 (the date of termination) to and including the date of the trial, was fair and could not have been confusing in any way to the jury. The entire damage was based upon a single act—Flintkote's termination of appellees' only available supply of accredited tile. It is also abundantly clear from the record that appellant at no

time during the trial made any contention other than that its termination of appellees' supply was single, definite and final. The idea that it was otherwise is obviously an unfounded attempt to bring the case within the language of those dissimilar and inapplicable cases dealing with continuing day to day partial restraints such as were involved in the *Bigelow* and other motion picture cases of that type.

VI.

The Attorney's Fees Awarded to Appellant by the Trial Court Were Reasonable.

(Specification of Error No. 14.)

The trial court's award of attorney's fees was based upon the usual factors observable by a trial court during the course of a trial and by stipulation of the parties upon the Petition for Attorney's Fees and Exhibit A, Schedule of Time appended thereto [R. 105-113] and Memorandum of Points and Authorities in opposition to such petition of the defendant.

We do not deem it necessary in this Reply Brief to rely upon anything other than the usual yardstick of measuring fees in antitrust or other cases, or in fact other than the most basic criteria contained therein. In the instant case the Petition for Attorney's Fees requested a total fee of $40,000 based upon the formula of $40 per hour for time spent outside of the courtroom and $250 per day spent in Court. Appellant does not deny seriously that this rate of pay is reasonable for a senior member of the bar in the City of Los Angeles in the type of litigation involved in this case. They merely say that such a schedule of fees "seems on the high side, but we are prepared to agree that $30 to $40 per hour and $200 to $250 for a court day for the services of senior members of the Bar could probably be supported * * *"

(App. Br. p. 136). Thus, the appellant substantially admits the reasonableness of the formula in arriving at the requested $40,000 fee. Appellees' counsel is of the age of 52 years and has since approximately the year 1934 been constantly engaged in the litigation of antitrust cases and in general court work. Appellant does not contend that appellees' attorney was not a senior member of the Bar.

It is clear from the cases, and it might be admitted for purposes of this argument, that the amount of recovery in an antitrust case does not constitute a principal factor in arriving at a reasonable fee. Thus, in the case of *E. A. Lynch, Trustee, etc. James Bankrupt v. 20th Century Fox Film, et al.,* No. 12976-HW, decided within the last year by Judge Harry Westover, in the Southern District, Central Division of California, an attorney's fee of $15,000 was awarded in a case where the jury returned a nominal verdict of $1,000. Similarly, in the case cited by appellant in its brief, *Village Theatre v. Paramount Film Distributing Corp.,* 228 F. 2d 721, Judge Ritter awarded a fee of $27,500 after a jury verdict of $20,000.

Appellant apparently admits that a $20,000 fee would have been reasonable (App. Br. p. 137). We think that the difference between appellant's opinion as to the reasonableness of the difference between $20,000 and the $25,000 actually awarded by the trial court could be explained and justified aside from the mathematical computation of the time in and out of the Court, by the trial court's observations during the course of the lengthy trial. Moreover, if we accept appellant's own formula as to the value of a senior attorney's time and give full credit to appellant for the 45 hours of office time consumed during court days by appellees' counsel either in the early morning or in the late evening, and deduct these 45 hours from the total of 515½ hours of office time,

the result would be that appellant's idea of a reasonable fee would amount to approximately $24,270. The difference of $930 certainly would form no basis for this Court finding an abuse of the trial court's discretion in awarding the $25,000 fee.

Finally, appellant finds no serious quarrel with appellees' contention that two-third's or three-quarters of a court day should be paid for as a full day, but as pointed out above, denies that in addition thereto extra office time should be accounted for. This Court will, of course, take notice of the fact that an attorney's day whether in court or out of court ordinarily does not consist of nine or more hours' effort per day. Appellees' affidavit attached to their Petition for Attorney's Fees [R. 108-113] shows without dispute that the 45 hours of office time consumed by their counsel during the 21 days of trial was time when added to the two-thirds or three-quarters court day brought the total working day considerably above the normal working day for a practicing attorney. This would be especially true where the 45 hours objected to elongated the ordinary strenuous trial day and where, as here, many of the office hours were spent on Saturdays, Sundays, or other normal holidays.

Certainly, the Court could and should have taken these extraordinary long days and holiday labors into consideration in fixing the attorney's fee, at least to the extent of accounting for the $930 about which appellant is apparently complaining on this appeal.

VII.

The Trial Court's Disposition of the $20,000 Received in Consideration of the Covenant Not to Sue Was Correct.

The memorandum of the decision of Judge Tolin adequately sets forth the law relating to this alleged assignment of error [R. 116-124]. Appellees rely upon this memorandum decision and adopt the same as its argument on this appeal. Additionally, this Court's attention is called to the following additional decsions. In the case of *Winckler & Smith Citrus Products Company, et al. v. California Fruit Growers Exchange, et al.,* No. 13788-C, decided on March 5, 1956, Judge James M. Carter adopted and followed the reasoning and result of Judge Tolin's decision in disposing of a similar consideration for a covenant not to sue in that case.

The Court's attention is further called to the case of *Western Spring Service Co. v. Andrew,* 229 F. 2d 413, in which the Court correctly pointed out the general principle adverted to in Judge Tolin's decision in the instant case. There the Court stated in connection with ordinary tort cases (not involving statutory trebling of damages) that:

> "While the Court in those cases does not set out the reason why such sums must be applied in mitigation of damages, it no doubt was done under the principle of unjust enrichment, that the plaintiff was entitled to only one full measure for the injuries suffered."

Appellant's argument to the contrary would, of course, reverse and distort the principle of unjust enrichment in this case by turning the purpose and benefits of the antitrust acts as they relate to private treble damage actions to the benefit of the defendant rather than the plaintiff. This is, of course, clearly pointed out in Judge Tolin's de-

cision. To hold otherwise would, as previously stated, result in unjust enrichment to the guilty party, contrary to common justice and the clear intent of the statutory public policy of the antitrust acts.

Appellant has cited a number of cases, none of which are contrary to the appellees' position and none of which in any wise substantiate the appellant Flintkote's position. The case of *Clabaugh v. Southern Wholesaler Grocers Association* (C. C., N. D., Ala. 1910), 181 Fed. 706, does not apply. A reading of the case fails to disclose any direct bearing or indeed any bearing whatsoever upon the question. In the *Clabaugh* case the Circuit Court held only that there had been full payment for the tort in the state court, and that for *this reason* plaintiff could not collect all over again in the Federal Court.

Conclusion.

It is respectfully submitted that the judgment of the District Court should be affirmed in all respects.

Alfred C. Ackerson,

Attorney for Appellees.

APPENDIX A.

Certified copy of the record in Socony-Vacuum Oil Company v. United States.

Company. I had no contract. I have been buying from Phillips Petroleum since 1932. I have been selling to more filling stations and purchasers the last two years than I was prior to 1932.

I attempted to obtain a more favorable contract during the years 1935 and 1936. I talked about this with E. M. Kelly, and John Getgood, Phillips' tank car salesmen, two or three different times in 1934, 1935 and 1936. Once was at the signing of that contract in 1935. Getgood is the one who signed that contract.

Q. What was the nature of this discussion that you had with Mr. Getgood on this subject, prior to the signing of that contract in 1935?

Mr. Donovan: Just a minute.

The Court: I think you better ask what the conversation was.

Mr. Donovan: If that be the question, I object to it on the ground that it is hearsay and narration of past events, it is not in furtherance of this conspiracy, and cannot be binding upon anyone excepting those concerned with this immediate contract, and is not to be considered as testimony against these defendants.

The Court: Overruled. Exception allowed.

A. Well, I tried to impress on him that we needed more margin in order to continue in business with the jobber's end of it.

536 He said that was the best contract they had to offer. He said other things that I do not recall. He said it was the same contract they were giving all their jobbers.

I did not approach any other major oil company with reference to obtaining a contract for the supply of my gasoline during the years 1935 and 1936.

A representative of Shell Petroleum Company named Cooksie concerned with tank car sales called on me in the early summer or spring of 1935, with reference to jobber contracts. I don't know how he happened to come to me at that time. He asked me when my contract expired. He called on me several times during that same general period. Our contract did expire, I think, in June. He said that they wanted distribution in that territory, they had very little, and that if I signed their contract, they would put men into the territory to help me work up a business. He did not show me any form of contract. He offered me a contract. He said their contract was the same as I had; 5½¢ split contract. He referred to it in that way. I did not show him my contract but explained to him what I had.

He said the only thing that he had to offer me was a better grade of gasoline and help to sell it. He told me that Shell gasoline would be better than Phillips.

I have followed the trend of the prices that I have been paying for gasoline to Phillips Petroleum Company in 1935 and 1936. The trend was up in 1935. In 1935,
537 the prices fluctuated quite a bit, there was a fluctuation of a full cent.

To my knowledge, I never bought or dealt in so-called "hot-oil".

I am a member of two jobbers' associations: the Wisconsin Petroleum Association, and the National Oil Marketers.

No cross-examination.

538 WILLIAM LANZER, a witness for the Government, testified as follows:

Direct Examination by Mr. Lewin.

I live in Chicago, Illinois. I went to public school and high school.

I have been with W. H. Barber & Company, a Delaware Corporation, for 13 years, and now am manager of refined oil sales. I held that position in 1935 and 1936. The principal office of W. H. Barber & Company is located in Minneapolis. I am in its other office in Chicago. It compounds lubricating oils and greases, handles and distributes linseed oil, turpentine, resin, and kindred products. It is sales representative of two refineries: In Chicago, Globe Oil & Refining Company of Illinois and Globe Oil & Refining Company of Oklahoma, defendants in this case; in Minneapolis, some Tidewater companies.

Our Chicago division has done a business since 1935 of about 60 million gallons of gasoline a year. Approximately the same quantity is handled each year by the Minneapolis division.

The principal states in which Barber Company does business and distributes gasoline are Illinois, Indiana, Michigan, Wisconsin, Iowa, Minnesota, North and South Dakota, and a little in Ohio. That territory has the name, in the oil business, of the Standard of Indiana terri-
539 tory, with the exception of Ohio. The Standard of Indiana territory has been a trade designation ever since I have been in the oil business, I presume because of the

the money we pay out of our pockets to Barnsdall Refining Corporation also goes down.

The tank car prices as published in the Journal of Commerce affected the price at which our gasoline was sold to the consuming trade. If the price in the Journal for spot market gasoline went up, I would not say the retail price went up exactly at that time, but it eventually went up. And if the price in the Journal should go down, the retail price would come down.

By the Court

As to what regulates the price the consumer pays at the filling station, I would say it depends entirely on the Chicago Journal of Commerce quotations. Thus, the consumer price at the pump has to go up to correspond to this 5½¢ margin.

Mr. Lewin: Q. Now, have you been satisfied with that contract with the Barnsdall Company that I have offered in evidence?

A. No, sir.

Q. Have you been satisfied with the price arrangements in that contract?

Mr. Donovan: I object whether he is satisfied or not. None of us are ever satisfied.

There is a provision in that contract by which we may terminate it at the end of 5 years. Mr. Reeser has
606 given us privilege of cancelling on different conditions.

The chief thing in our business by which we can determine whether we can make money on gasoline is the margin. By the "margin", I mean the difference between what we pay for our gasoline under the contract and what we can sell it for. I believe there is nothing else that approaches that in importance, and of course, the reasonable overhead.

The retail prices during 1935 and 1936 varied at about 5½¢ above the tank car price as published in the journals.

I complained to several people in the Barnsdall Refining Corporation, one of whom was Mr. E. B. Reeser. One conversation with him was about 2 years ago, about Christmas time. I have complained at other times.

Q. Now, will you state for the jury the substance of Mr. Reeser's remarks to you on that subject.

Mr. Donovan: I object to that, if the Court please, being hearsay and improper and being an

attempt to have this evidence adduced as against these defendants not made in the course of the alleged conspiracy, being a narration of a past event, and certainly not in furtherance of the conspiracy.

607 Mr. Lewin: Your Honor, one of the allegations of the indictment we are trying here is that these contracts were uniform and that money was exacted from the jobber. This is certainly a conversation of one of the defendants with this witness and certainly admissible against him, at least.

The Court: Objection overruled. He may answer. Exception allowed.

Mr. Donovan: May I ask the Court to instruct the jury that, if admitted, it shall not be considered as evidence against any of these defendants, excepting the person named.

Mr. Lewin: And the company. I am agreeable to that.

The Court: Yes, for the time being.

A year ago last Christmas, in Tulsa, Oklahoma, Mr. Reeser told me in substance, "I know that you can't make money on a 5½¢ margin. However, I can't do anything for you. If better contracts are written, we will be glad to write you a better contract." I don't believe he said better contracts were written by him.

To follow that up and find that there are better contracts written is a pretty hard thing to do. I know in my own mind from conversations with other jobbers there are better contracts, but I can't say that definitely,
608 because I never saw a better contract.

I subscribed to the Chicago Journal of Commerce. I make use of that in my business. The invoices that I have described contain on their face the basic price as of the date of that invoice. I have our office compare that basic price as appears on our invoice when we receive it with the quotations in the Chicago Journal of Commerce to see whether they compare to that average on the B Square, and in the case of the low, to see whether they compare on the low. That check is made from day to day.

We keep a record in our files of those clippings from the Chicago Journal of Commerce, showing price quotations and our invoices, to show that comparison. At your request I made a study of those records to see whether there were any changes in those basic prices as compared in our invoices for 1933, 1934, 1935 and 1936. I have that here.

we were in a situation where the retail price had not risen to a price 5½¢ above the tank car price. During 1935 we were always on an up-grade market, and would have to assume the difference between 5½¢ and actual margin. We had such a market during part of 1935, and the dealer market was on the up-grade. Of course we were asking our supplier for more margin; I think everybody did that.

By the Court

Assuming that in my business I lost $10,000 in one year, under my contract, I assumed half of that and my supplier assumed a half. Under the term of my contract, as to whether I could make up that $5,000 loss, the top was open, but the spread was never great enough so we would exceed a 5½¢ margin. Only once, I believe in 1936, for a few days we exceeded the 5½¢ margin and that was due to a drop in the tank car market, when they did not drop the dealer tank wagon or the consumer tank wagon price in that particular time.

During the life of my contract I suffered some small amounts of loss where I had to bear half of it. There was no time where the market fluctuations under my contract permitted me to recover that loss in 1935 or 1936, that I remember, because of the fact that it was an up-grade market. If it had been a down-grade market, we might 529 have been able to make a little profit.

But there was a provision in our contract which permitted us to make up that loss if the market was higher and there was more spread, but we were operating and purely following the market maker's price. We couldn't over sell the market maker.

I think there was a provision in the first contract on the 5½¢ that we would adhere to the market maker's price. It was generally understood in the industry that there was a market to follow.

By Mr. Chaffetz

I discussed the question of obtaining a more favorable contract during the years 1935 and 1936 with several representatives of Socony-Vacuum Oil Company. I discussed it with Ray Mering of the Kansas City office. I used to consider he was vice president of the White Eagle. I don't know whether he is now or not. I presume this was when he was assistant to Mr. Marcel. I don't know. White Eagle is a division of Socony-Vacuum Oil Company. I talked to him in 1935 and 1936.

Q. What was the nature of your conversation with him in 1935?

Mr. Donovan: I object to that question, your Honor, on the same grounds that I have made an objection to such conversations with any representa-
630 tives of these companies by these jobbers; more particularly being hearsay and does not relate to any issue involved in this case; that it is not a matter in furtherance of any alleged conspiracy or any act done in furtherance of any conspiracy; and for those reasons cannot be taken as evidence against any of these defendants, excepting the person making the statement.

Mr. Chaffetz: I have no objection to the jury being instructed to regard this statement as being binding only on the person making it and his company, the Socony-Vacuum Oil Company, which is a defendant here.

The Court: That is the only way in which it will be received, only on that basis. Objection overruled. Exception allowed.

The Court: What this witness may say will have no bearing, of course, on any of the defendants, except Socony-Vacuum Oil Company and the man making the statement.

I asked Mr. Mering if it was possible to get an increase in margin. He said they only had the one contract. He couldn't see how they could increase the margins, but that if later on there was an increase in margins, he would be one of the first ones to give us the increase in margin re-
gardless of the length of contract. Mr. Mering told me
631 at that time there wasn't any better contract avail-
able. In other words, he meant by that if our contract was dated on November 19, and there was a better contract available, I presume, from his company or any other company, before that contract expired, he would give us another contract.

Mr. Fred Elliot was the man with whom I signed the contract, and he is the man with whom I signed the second contract. At that time he was working out of the St. Paul, which is under the Kansas City office. He was assistant to Mr. Halverson over there, and I presume he would be classified as assistant manager at the St. Paul office. I had a conversation with him.

Mr. Chaffetz: Q. Can you give us the substance of such conversation?

Mr. Donovan: May the record show that the same

objection I made to the other question relating to a conversation with any representative of the company is objected to?

The Court: Objection overruled. Exception allowed.

At the time I was negotiating for this contract, I asked Mr. Elliott for a better contract, and he informed me that that was the standard contract, and the only contract that was being written by the St. Paul office.

632 I never bought or sold any so-called hot oil that I know of.

I am a member of the former Iowa Petroleum Association, and the new Association which is being formed in there, called the Iowa Independent Oilman's Association, and the National Oil Marketers Association.

No cross-examination.

633 OSCAR L. PETERSON, a witness for the Government, testified as follows:

Direct Examination by Mr. Chaffetz.

I reside in Evanston, Illinois. My place of business is Chicago. I am vice-president and financially interested in George C. Peterson Company, a corporation, which has been in the oil jobbing business since 1916, about 22 years. I was one of its organizers.

The nature of my business as an oil jobber generally is buying gasoline, fuel oil and lubricating oils in wholesale lots in tank cars, and redistributing through bulk plants to dealers and consumers. The company has 7 bulk plants located in Chicago and vicinity. Those plants have a total capacity of about 1,500,000 gallons of gasoline.

The annual volume of our sales in 1935 and 1936 in gallons of gasoline, both at wholesale and retail was about 15,000,000 gallons each year. Of our total volume of sales about 50% was resold in tank cars, that is, we performed a brokerage business as well as a jobbing business. About 88% of the gasoline sold in our jobbing business in 1935 and 1936 was regular or housebrand gasoline. We have more than $1,000,000 capital invested in the oil business.

I think we are the largest independent oil jobbing com-
634 pany in Illinois. We perform a jobbing business practically the same as the other jobbers who have testified here, except on a larger scale.

I think Cities Service and Empire were the same, or substantially the same, or are now, at least. It was Empire at that time. I discussed the matter with Mr. E. C. Steffey of Chicago, a wholesale tank car salesman for them in the Chicago district.

Q. And what conversation did you have with him on the subject that we were discussing?

Mr. Donovan: The same objection as before as at Record pp. 241 and 292-293.

The Court: Objection overruled. Same ruling. Exception allowed.

(The following two paragraphs were admitted in evidence, at the suggestion of counsel for the Government, only against Cities Service Oil Company and Empire Oil & Refining Company:)

Mr. Steffey came out to our office to discuss with me a gasoline contract in August or September, 1935, and
638 I said that we had a contract, as he knew, with Socony-Vacuum Oil Company, which would expire later in the year, under which we were unable to make a living, and we were in the market for a few connections, if we could obtain a different proposition. Mr. Steffey said, "Well, our contract is no different from the one you have now; in fact, it is the general contract that is being used in the oil business by most of the suppliers, but we may have something else to offer you, which will be enough of an inducement so that you could better afford to have our contract than the one you have, even though they might be the same." And then I said, "Well, Mr. Steffey, what have you in mind?" And he said, "Well, you do a large fuel oil business, and we are large manufacturers of fuel oil, and perhaps we could supply you to a degree that would make quite a difference in your balance sheet." I said, "Well, that sounds interesting; what have you got to offer?" He said, "Well, that is rather a big proposition, and I will have to communicate with our sales office at Tulsa, to see just what the situation is."

A little later on, perhaps 10 days or 2 weeks, he again came out to see me and said that on account of the marketing set-up of Cities Service Company, which was then the marketing division of the Empire Refineries, that if they provided us with their gasoline to sell in that terri-
tory, that there would be duplication of outlets, in
639 other words, we would be selling in the same territory as they were selling, and at the present time they did not think it was a practical thing to do, and therefore

they would be unable to go any further in their negotiations with us. However, we did come to an agreement about a supply of fuel oil.

There were many contracts in existence with jobbers and between many supplying companies, and, while they may have varied in some slight detail, the price provisions would come out the same in the end.

In the last 20 years there has been a great change in the type of contract. Going back as far as 1922, I think every refiner had his own type of contract, and his own idea of how he wanted to make a contract, and that carried on for a good many years.

For many years, there were periods when no publication was used, and no price except the posted price of the market leader in the district.

Then, along about 1929 or 1930 contracts began to appear more or less alike. The wording seemed to be a great deal the same, and the provisions the same; and then the price basis commenced to be based on the trade publications, with a split protection feature based on, generally, the price of Red Crown gasoline in the Standard of Indiana territory.

And then, a little later on, when the Iowa plan was 540 adopted, the price basis was changed from the service station price to the tank wagon price.

During 1935 and 1936, in my experience, I found that the contracts offered by the large major oil companies were generally pretty much alike.

In years gone by, we sometimes had no contract at all; we simply bought our supplies from whom we could get to supply us, and at an open market price. Other times, we had maybe a very simple contract with a refiner; it might last for a short period of time, or it might last over a number of years. There was no time prior to 1930 that we weren't free to buy from practically anyone, because at that time we sold all of our gasoline under our own brand, our own trade mark.

After that time we commenced selling major company brands. Naturally, if a jobber is selling the product of a major company that has an established brand, he sells under that brand. Then, of course, we became more or less restricted to that particular brand which we happen to be selling of the major company. In general, there was a greater latitude in which to buy than there has been of late. That was prior to 1930.

Our company preferred to handle a major company brand of gasoline because the major companies have ad-

(Letter and enclosure referred to are received in evidence as EXHIBIT 629.)

(The witness then explained the price provisions of his contract, Exhibit 628, which explanation is omitted here because such provisions speak for themselves.)

At that particular time, on the 6¢ margin, there was a 4¢ dealer discount. That was based on the 4¢ dealer discount, and whenever that dealer discount was reduced, our spread was reduced accordingly; or, if it was increased, our spread was increased accordingly.

(Witness continued his explanation.)

During the greater part of 1935 the prevailing spread between the retail price and the tank car price, plus freight, plus taxes, was never up to the amount of our basic 654 guarantee. By that I mean 6¢ while the 4¢ dealer discount was in operation, and 5½¢ while the 3½¢ dealer discount was in operation. I can't recall exactly when the 3½¢ dealer margin came into operation. I think it was sometime in 1935. After the dealer margin became 3½¢, our guarantee became 5½¢. The actual spread between the tank car price, plus freight, plus taxes, and the prevailing retail price hardly at all exceeded 5½¢ during 1935. There were some times in 1936 when it did, not very long periods of time.

Now, take during 1935, when it wasn't there, we really weren't getting 5½¢ because we were standing half of that excess, and sometimes it amounted to $8, $9, $10 and up to $30 a car, if I remember right. That condition was very general in 1935. The dealer got 3½¢ out of whatever margin we got. So our split, so far as we were concerned, was below 2¢. Part of the time we only had 1.7¢, part of the time 1.8¢, part of the time 1.9¢. We had to pay all of our expenses out of that margin.

Gasoline supplied under that contract was shipped during 1935 and 1936, some from Barnsdall, Oklahoma; some from Okmulgee, Oklahoma; and some from Wichita, Kansas. It was all shipped in tank cars by rail.

We preferred to do business with a major oil company on account of the national advertising of their prod-
655 ucts, and better trade acceptance.

I have discussed with representatives of our supplier, during 1935 and 1936, the possibility of a change in the form of our contract.

Q. On what occasions, and with whom?

Mr. Donovan: I object to that upon the same

grounds that I have stated before, may it please the Court: That it is hearsay; that it has no relation to any of the issues in this case; that it cannot be considered as evidence against any of these defendants on the issues presented under this indictment.

Mr. Chaffetz: We again yield to a ruling from the Court that any such testimony is limited in its effect to persons making the statements to the witness and to the company of which he is an authorized agent, and officers of that company who may be defendants here.

The Court: Any testimony of this witness as to those conversations will be so limited, and the jury may understand that.

The Witness: Should I answer?

Mr. Chaffetz: Yes.

The Court: Objection overruled, with that exception. Proceed.

656 In 1935, I made 2 or 3 trips to Oklahoma in regard to it, and again in 1936 to see the Barnsdall Company in regard to the price conditions set up on my contract. On both trips, I talked to Mr. G. F. Racette, who was vice president in charge of marketing.

I told Mr. Racette that it was impossible to continue in business with the present margin on our contract, and wanted to know if anything could be done about it. He said there wasn't anything that could be done, and I asked him what he thought the future of the jobber was in this business. I told him that it was impossible to go ahead on a 2¢ margin and stay in business, and I asked, "Is this going to be just temporary, this low margin for the jobber, or as time goes on, is there going to be a better margin?" And he told me, "Well, I don't see much hope for the jobber." And then I said, "Well, there ought to be some kind of relief on a condition of this kind." He said "Well, the only relief that I can offer is to lease your plant to us." He said, "We would consider leasing your plant, if you would be the agent down there." "Mr. Racette," I said, "That is putting me right back where I was 27 years ago. I wouldn't be interested in that proposition, being a commission agent." That finished the conversation at that particular time with him.

Then I talked, either on that trip or in September, with Mr. E. B. Reeser, the president of Barnsdall Company.

657 Mr. Donovan: Same objection.

Mr. Chaffetz: The Government suggests this evidence be admitted on against Mr. Reeser and the Barnsdall Company.

The Court: Yes. Same ruling. Exception allowed.

I asked Mr. Reeser if something couldn't be done in regard to a longer marginal contract, that it cost us more to do business than what our margin was, and we were losing money down there. He told me, "Well, Harry, it is a sad state of affairs when our good customers are losing money on our products", and I added: "Yes, even on a normal market". And I said, "Why don't you do something about it? You are a big company; why don't you put out a contract we can live on and let live?" And he said, "I can't change that contract one iota," or something to that effect. That was all he said.

I never contacted any other major oil company, but several have contacted me. My contract had a six months' cancellation notice on it, and they all knew it, and from time to time I was contacted by other major oil companies with respect to my signing a jobber contract with them.

Mr. Tom Koneke, tank car sales representative of Mid-Continent Petroleum Company called on me I would say 5 or 6 times during the course of 1935, and maybe 3 or 4 times in the early part of 1936. On most occasions I discussed the matter of a jobber contract with him. I
658 told him I would only be interested in a change if I could get a better contract, and he said, "Well, we have no better contract to offer than what you have, but we believe our merchandise would sell better and has better trade acceptance, and is better advertised." I said, "Well, Barnsdall is well known around here; we have no sales resistance on it, and the only thing I am looking for is a contract that is better than the one I have got. If you have one, I will talk with you", and he said he did not have it. I did not talk with any of the other representatives of that company.

I talked with Mr. Oscar Whateley of Lubrite Division of Socony-Vacuum. He and one other sales representative made 8 or 10 trips to see me, and my conversation with them was practically the same as with Mid-Continent.

Mr. Donovan: Same objection. (See objection stated at R. p. 292-3.)

The Court: Yes. Same ruling. (See ruling at R. p. 293.) Exception allowed.

Mr. Chaffetz: The Government suggests that this evidence be admitted only against Socony-Vacuum Oil Company, Inc.

I said that I was not interested in making any change until I could get a better contract; that the trade acceptance of Barnsdall was very satisfactory, and I was only looking for a better margin. He said they didn't have any to offer, but he believed that with their advertising
659 campaign, we would have more gallonage, and I said, "I am not interested in more gallonage unless there is a profit in it."

I talked with the St. Louis representative of Tidewater Company, but I do not recall his name. He called upon me in 1935 and once or twice in 1936. He was a tank car sales representative.

I discussed the matter with Mr. H. A. or W. A. Perriquey of Continental Oil Company during 1935 and 1936. He was in my office at least 5 times during the course of each year, and I cannot say when it was. It might have been one call in January, maybe another one in March, or April. They were 2 or 3 months apart. He was jobber or tank car salesman. I told him the same thing; that I was not interested in a change from Barnsdall unless I could secure a better contract, and he said "Our contract is the same as theirs, and I have nothing to offer you in that way unless it is a change in the merchandise which might be better."

The Court: I want the jury to understand that the testimony as introduced on this subject as to any company is binding on that company only.

Mr. Chaffetz: Q. Mr. Miller,—

Mr. Donovan: Just a moment.

(Mr. Donovan and Mr. Chaffetz conferred with the Court out of the hearing of the jury.)

660 (The following occurred in the hearing of the jury:)

The Court: Gentlemen of the jury, there seems to be some misunderstanding here. I want to say to you this; I say this to you now; that this witness has testified as to conversations he had with representatives of the Barnsdall and Socony and Continental Oil Companies, and any statement he has made as to conversations with each of those companies' representatives is binding thus far only on that company, and not upon the other defendants in the case.

Mr. Chaffetz: And we understand that the Court has made —

Mr. Donovan: I must object to the statement "is binding." It may be admissible, but it certainly cannot be binding.

Mr. Chaffetz: The defense counsel used the word "binding."

The Court: Can you suggest a better word? The evidence is admissible against these corporations and not as against the other defendants.

Mr. Lawton: I think I may have used the word "binding" the first day. It is a word we use down in Illinois, and it may be unfortunate.

661 The Court: So the jury understands they have made an objection to the admission of that evidence, your consideration of that, I am saying to you now that it is admissible as against the corporations or the officers of those corporations that this witness has had conversations with, and against them only.

Mr. Chaffetz: And the Government understands the Court has made the same ruling with respect to similar testimony from other witnesses.

The Court: Yes, let the jury understand that. Anything I may have said to you is qualified so as to correspond with what I have now said.

I am a member of the Missouri Jobbers' Association, and National Oil Marketers Association. I don't know exactly, but I think there are around 100 or 150 members in the Missouri Association. I have never to my own knowledge bought or sold any hot oil.

No Cross-Examination.

662 JACOB H. MIDDLETON, a witness for the Government, testified as follows:

Direct Examination by Mr. Chaffetz.

I am 44 years old and reside at Bowling Green, Missouri. I was an oil jobber during the years 1935 and 1936, but discontinued that business in September, 1937. During that time I was also in the general insurance business. That is my business now. I am at present presiding judge of the County Court in Pike County, Missouri. That is not a legal position. I am not a lawyer.

678 They told me that the new contract was different from the type of contract that Empire Oil & Refining Company was making with jobbers at that time. They told me that the 50-50 basis contract was mostly in effect, a 5½¢ split contract.

Q. When you say the 50-50 split, do you mean the contract based on the average of the averages of the Chicago Journal of Commerce and Platt's Oilgram, with a provision for a 5½¢ guaranteed margin, subject to that split?

A. Well, we asked to be released from Platt's Oilgram ourselves, or the National Petroleum News, rather; and they did that at our own request.

We do not and never during 1935 and 1936 did operate under the brand name of the Empire Company, or Cities Service Company. We operate under the brand name, Midway Oil Company, Midway brand, our own brand.

The contract you show me, dated Tulsa, Oklahoma, February 14, 1935, between Empire Oil & Refining Company and Midway Oil Company, is the contract to which I have testified. I operated under that contract down until I entered into the new contract with the Empire Company on March 11, 1936.

(Contracts referred to received in evidence, respectively as EXHIBITS 632 and 633.)

679 I had a discussion with E. C. Steffy, division manager at Chicago of Empire Oil Refining Company at the time that the contract in 1936 was made.

Q. Now, will you tell us what discussion you had with him at that time with reference to a jobber contract?

Mr. Chaffetz: The Government has no objection to this evidence being admitted only against Empire Oil & Refining Company.

Mr. Donovan: The same objection, if it please the Court to this discussion as appears at R. p. 241 and 292-293.

The Court: The same ruling. Objection overruled and testimony admissible only against Empire Oil & Refining Company. Exception allowed.

I told Mr. Steffy that we didn't feel that we were getting enough margin, that we couldn't operate on that basis. He said, "I realize it, as well as you do, but can you get any better?" I said, "Not that I know of. I would like to shop around a while." "Well," he said, "I will tell you, while I haven't seen all of them, I have seen a great many of the

the practice of posting normal service station prices throughout the state in which destination is located, then and in that event, paragraph three of paragraph B of the contract will be inoperative and the price to be paid thereafter will be determined by the remaining provisions of this agreement.

The contract of 1936 was modified by a rider on September 16, 1936. The rider became a part of the 1936 contract. It was related to the Iowa Plan for the State of Missouri. It put a clause in the contract so that the guarantee provisions were based on dealer tank wagon price instead of retail price. Instead of our guarantee margin being 5½¢ below the prevailing retail price it became 2¢ below the dealer tank wagon price, as posted by Standard of Indiana. The relation between that dealer tank wagon price and the previously prevailing normal retail price was 3½¢, so that the margin of the jobber was not changed in any way providing we received the guaranteed margin of 5½¢ under the retail price. Of that 5½¢, if we received it at all, we passed 3½¢ on to the dealer, leaving ourselves 2¢.
684 When the Iowa Plan was adopted, we just got the 2¢ under the dealer price. In each case the 5½¢ and the 2¢ guarantee was subject to the so-called split provision.

When the 5½¢ split margin contract was in effect, the split provision operated at times. I can't give you the dates. I believe it did during 1935 and 1936. The split provisions as contained in our contract mean that if the price which was determined by the average of the two journals mentioned plus rail freight, plus 5½¢, was in excess of the posted retail service station price of Standard of Indiana, the invoice price was reduced by half of the excess. Thus we didn't have a guarantee of 5½¢. Out of the 5½¢ guarantee, if we had gotten it, 3½¢ would go to the dealer anyway. So with respect to our own business, our guarantee was really a 2¢ guarantee both before and after the adoption of the Iowa Plan. If the margin was less than 2¢, the Continental Oil Company reduced our invoice prices by half of that difference.

Our company has preferred to purchase from a major oil company because of better consumer acceptance.

We have discussed with our supplier the subject of a new or different type of jobber contract every time a contract came up and many times between. In 1935 and 1936 we discussed it at frequent intervals with Henry Perriquey who was the jobber salesman for Continental in that territory.

685 Mr. Chaffetz: I asked you what was the discussion you had in 1935 and 1936 with Mr. Perriquey with respect to a jobber contract?

Mr. Donovan: I object to that question, if the Court please, because it is immaterial and incompetent and because it is necessarily calling for hearsay, because it is not pursuant to any allegation of conspiracy set forth in the indictment, because there is not proof of authority or agency of the party making the declaration, and it is not admissible against any defendant, individually or corporate, here, and because it is not within the allegations of the indictment.

Mr. Chaffetz: The Government suggests that this evidence be admitted only against Continental Oil Company.

The Court: Objection overruled, but so the jury may understand, the evidence of this conversation will be admissible only as against the Continental Oil Company. Exception allowed.

I knew what Mr. Perriquey's position was with the Continental Oil Company. I had done business with him over a period of time, and had occasion to confirm that he was in truth an employee of the company.

686 We simply asked if there wasn't some possibility of supplying a contract that would yield the company a better margin, and Perriquey said that of all the contracts he had seen it carried the same price provisions as the rest of them, and as far as his company was concerned, there was nothing better to be had.

Under our contract we were not required to sell the dealer at a certain price but we had to compete with the dealer margin offered by the Standard of Indiana. There was no provision of the contract that required us to sell our gasoline according to that figure. That was just a custom of the trade. We might sell a little gasoline, but certainly wouldn't sell much at a price higher than that posted by Standard of Indiana. Our dealers wouldn't get any business if they tried to sell at a higher price. I never saw it tried.

I talked at various times with J. S. Curtis, a division manager of Continental Oil Company at Kansas City, on the same subject as I talked with Mr. Perriquey. He was division manager and I had done business with him over a period of quite some time.

Q. Can you tell us what were your discussions with him on that subject during 1935 and 1936?

Mr. Donovan: Same objection as appears at Record pages 241 and 292-293.

687 Mr. Chaffetz: The Government makes the same suggestion that this evidence be admitted only against Continental Oil Company.

The Court: Same ruling. It is admissible only as to the Continental Oil Company. Exception allowed.

A. I would be unable to fix any definite time. There has been a number of conversations during the years we have done business with them, over this 5½¢ margin. But I discussed it with Mr. Curtis during the period 1935-36.

I never, to my knowledge, bought or sold any hot oil. I am a member of the Missouri Independent Oil Jobbers Association, and National Oil Marketers Association. The Missouri Oil Jobbers Association has somewhere between 100 and 150 members.

Cross-Examination by Mr. Donovan.

Under the contract I could sell at any price I pleased. We sell at a price which enables us to meet competition. We don't attempt to meet all competition, but any reasonable competition.

If I am a jobber and have a service station, and operate that service station in addition to my jobber business, I get my jobber margin and also my dealer margin. As we have discussed here, that might be 5½¢.

688 Q. Let's suppose that your station is standing at a very desirable corner, and you have an advertised brand, and you are doing a good business, in fact, in that sector you perhaps have the dominant business. Let's say I come along, and I get a good brand, and I get a store nicely painted up and some good tanks on the corner opposite to you. Now, I am a dealer, and I am getting only 3½¢. Suppose that I am green in this business, and I am foolish enough to think I can compete with you, and I, at the same time that you are selling at 20¢, I cut my price to 19½¢. If you began to see the business come to me after a week or so and you began to see your business decline, what would you do?

that out of our pocket. And when we are collecting a 5¢ gas tax on a 1 7/10¢ or 2¢ gross profit, it is a difficult job. It is one of our expensive items. Of course, added to that has been an increase in wages and an increase in price of equipment, especially new computing pumps that we
700 must have and install. These pumps used to be bought for probably $100 or $125, and the best type of pump now is $225.

Jobbers are often required to buy these. On a 2¢ margin, it requires a long time to pay for them. Then, of course, we have the accounting and bookkeeping demanded by two states, or any state if you are operating only in one state, as to your records and gas tax. In addition to these things, we have the usual expense of a wholesale business such as maintenance of equipment. We have bulk plant, salaries of employees, and insurance.

Our type of business I think is distinct from any other merchant. Another merchant is not responsible after he sells. He is not responsible for this tax, but the jobber is. That, as I understand it, is one of the difficult parts of a jobbing business.

In the early days of the jobbing business there was no tax. We have had a tax about 5 or 6 years. But the taxes have been increased. On a 2¢ gasoline tax our hazard of collection is not so great of course as on a 4¢ tax.

During 1935 and 1936 we had occasion to discuss with a representative of our supplier the subject of a change in the form of our jobber contract. On account of the narrow margin, and our expense increasing, we went to them several times in 1935 for a better contract. I talked prin-
701 cipally to L. C. Trapp, assistant sales manager of the Empire Company.

Q. What conversation did you have with him in 1935 and 1936 on that subject, and give us if you can the time and place of such conversation if you can recall it.

Mr. Donovan: I object to that, may it please the Court, as incompetent, and immaterial because necessarily calling for hearsay. It was not made in furtherance of any alleged conspiracy under this indictment, and certainly is not within the issues of the allegations set forth in this indictment, and not evidence against any of these defendants.

Mr. Chaffetz: The Government suggests this evidence be admitted only against Empire Oil & Refining Company.

The Court: Objection overruled, with this qualification; that it is admissible as to the Empire Oil & Refining Company. Exception allowed.

We spoke to Mr. Trapp regarding this contract at the time of the renewal. That would be in September, 1935, and like all jobbers, we complained of the narrow spread, and of course asked for a better contract, but could not secure it. Mr. Trapp did not tell me why he could not give me a better contract, but he did tell me that if there
702 were better contracts obtainable then he would give me the same kind of a contract, that is, as I understood.

During that same period I talked with Fred Wibert of Duluth, Minnesota, who I understood was the jobber salesman of Shell Petroleum, on that same subject. I asked him what kind of a contract the Shell was offering. I thought they were a big organization and might have a better contract. He told me it was the usual 5½¢ split and he could do nothing better; he said, "I can do nothing for you."

The house brand gasoline that we handle for the Empire Company is known as "Koolmotor". If I make a comparison, Red Crown would be the house brand of Standard Oil and Cities Service "Koolmotor" is the house brand, the name of the leading brand of Empire.

We prefer to handle a major company brand of gasoline because of the public or consumer acceptance, and the advertising. I find consumers prefer to buy an advertised brand of gasoline for this reason: that when you are dealing, like most jobbers have to, with re-sellers, they prefer a nationally advertised brand. So it is necessary for us as jobbers oftentimes to carry a major line if we hope to do business with re-sellers, which is the principal part of our business.

703 *By the Court*

The jobber suffers loss through the evaporation of gasoline in two ways: one, through evaporation, and especially in northern Wisconsin and Minnesota, what is known as shrinkage. That is 1% for every 20 degrees in temperature. For instance, if we have a car of gasoline shipped to us, which we often have, at 10 below zero, we would have an equivalent of 3% shrinkage, and on an 8,000 gallon car it would amount to 240 gallons of gas that we never could sell as long as the weather stays 10 below. It gets 40 below in Superior. In hot weather, of course, there is an expansion, but we have to buy this gasoline at 60 and in northern Wisconsin we don't have very many

ays much over 60. The mean temperature is 39 for the ear. So we do stand a substantial loss in shrinkage.

Cross-Examination by Mr. Donovan.

I started in the oil busines in a small way in 1922. ince 1930 I have given pretty much 100% of my atten- ion to this business. Over this period I inquired into he different phases of the business and into its business azards and difficulties. The hazards that we happen to ncounter certainly are the same kind of hazards that the hole industry has to encounter.

The refiners and the producers have to pay taxes, and all have to encounter the same kind of danger up to 04 the point where we buy. After a refiner, independent or major oil company ships a car of gas into a town, hen he is relieved at that moment from any gasoline state ax.

Our expenses come out of our total income on all the roducts that we sell. 70% of the total income is the ¢ margin on gasoline. We deduct our expenses from ur total income when we make our income tax return.

When we sell to a dealer, we sell under an arrangement r a contract that allows him 3½¢ margin. When other obbers have contracts or arrangements with other dealers hey allow the same margin, to the best of my knowledge.

Q. So that normally, that margin of 3½¢ which the jobbers allow the dealers, normally, that margin is uniform throughout the trade, is it not?

A. It is based on the contract.

Q. Whatever it is based on, the margin is the same as allowed by the jobbers to the dealers; is that correct?

A. It is true, but it is right in our contract. It is based on the Standard Oil tank wagon market. 3½¢ to the dealer, and that is in the contract.

Q. Where is it in your contract that you must allow 3½¢ to your dealers?

05 A. I said it was based on that. That is why we compute our protection.

Q. You can sell at any price you please.

A. I couldn't sell it over that amount.

Q. Where is it in your contract that provides you are to do that?

A. It is not provided, but it would be bad practice to do it. You can't and be successful.

The Court: Objection overruled. Exception allowed. I will say to the jury that, at this state of the proceedings, it is admissible as to the Mid-Continent Petroleum Corporation only.

I told Mr. Berger I was dissatisfied with the new contract. The earlier contract, under which I had been operating, provided for a 2½¢ guaranteed margin, and they were cutting me down to 2¢. According to their invoices, they had cut me down to 2¢, beginning March, 1934. Of course, I realized that when the first contract was over the 2½¢ guaranteed margin would not apply to future shipments. I hated to be cut down to 2¢, so I ob-
709 jected to it. However, Mr. Berger stated that that was the best contract they would give; it was the same kind of a contract as others were giving, and I might just as well sign this contract, because I couldn't get anything better; and if there was a better one offered to me from the larger companies, that their company would no doubt go along with any similar contract.

I knew that I had to negotiate a new contract if I wanted to continue with them. Mr. Berger did make some concessions to me. He omitted the split of guarantee of 2¢, which provision was stricken from the printed form. I was given a flat 2¢ guarantee. Also, I endorsed a clause to the effect that if their company, any time during the continuance of this contract, presented a better contract, I had the privilege of cancelling this contract, and accepting the better contract.

Cross-Examination by Mr. Donovan.

I am now operating under a 5½¢ guarantee open top.

Supreme Court of the United States

I, Harold B. Willey, *Clerk of the Supreme Court of the United States,*

o hereby certify that the foregoing photostatic ----------

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ontain a true copy of the excerpts from the transcript of record as

rinted for the use of this Court ---------- *in the case of*

he United States of America, petitioner, v. Socony-Vacuum Oil Co., Inc., et al.

and

~~vs.~~

ocony-Vacuum Oil Co., Inc., et al., petitioners, v. The United States of America

os. 346 and 347 *, October Term, 19* 39 *, as the same remains upon the*

les ~~and records~~ of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this Nineteenth ------ *day of* March ------ *, A. D. 19*56 .

HAROLD B. WILLEY

Clerk of the Supreme Court of the United States.

By Reginald C. Dille

Deputy

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